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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-1

In the Matter of

Local Exchange Carrier Access
Tariff Rate and Earnings Levels

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1990; Released: February 28, 1990

By the Chief, Common Carrier Bureau:

1. On January 5, 1990, the Common Carrier Bureau (Bureau) released an Order To Show Cause in this docket.[1] In that Order, we directed certain local exchange carriers (LECs) to reduce specified rates, or to show cause why we should not prescribe reduced rates. On February 21, 1990, after reviewing the LECs' responses to our *Order To Show Cause*, we released an Order that directed certain carriers to file tariff supplements to effect rate reductions to be effective March 1, 1990.[2] One of these carriers is Nevada Bell. On February 26, 1990, Nevada Bell filed its tariff supplement, and also filed a request for stay and a petition for expedited reconsideration.

2. Nevada Bell argues that the Bureau has erroneously concluded that Nevada Bell will overearn because of the level of its current rates, and that Nevada Bell's fourth quarter expense increase was not considered in the Bureau's conclusion. Nevada Bell argues that its current Common Line and Special Access rates will produce earnings that will not exceed the authorized 12 percent rate of return for the access period ending June 30, 1990, so it is likely to prevail on the merits of its reconsideration petition. Nevada Bell states that, absent a stay, it will be irreparably injured as it would be required to charge rates that will produce earnings far below the authorized levels. Grant of a stay will not have a significant adverse effect on other parties, Nevada Bell asserts, since they would not be precluded from challenging the current rates. Finally, Nevada Bell avers, grant of the stay is in the public interest, as it would maintain the status quo pending reconsideration, would permit Nevada Bell a reasonable opportunity to earn the authorized rate of return, and would avoid rate churn.

3. We are not persuaded that Nevada Bell has demonstrated the likelihood of its prevailing on the merits. In order to justify the grant of a stay, under the terms of Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 152 (D.C. Cir. 1958), as applied in previous Commission orders, Nevada would have to show that this Bureau failed to consider the data before it, or drew a conclusion that somehow misread or misinterpreted those data. We find, however, that Nevada's showing in support of its request for stay displays the same flaws that we mentioned in the *Show Cause Response Order* as supporting our conclusion that Nevada's rates would result in overearning.

4. The *Order To Show Cause* directed Nevada to file rate reductions or answers in each category - Switched Access, Special Access, and Common Line. Nevada filed a rate reduction for Switched Access only; it filed neither an answer nor a rate reduction for Special Access and Common Line. In the *Show Cause Response Order* we directed Nevada to reduce rates for Common Line and Special Access to produce a reduction of $1.5 million for Common Line, and $58,000 for Special Access, on an annualized basis. That requirement was based upon our analysis of the only information we had before us from Nevada regarding its Common Line and Special Access rates, that being the Description and Justification (D&J) that accompanied its tariff transmittal reducing Switched Access. We stated:

> Nevada Bell apparently contends that the net effect of expenses and revenues that it did not anticipate when it filed its annual access tariffs will offset overearnings that would otherwise result from its current Special Access and Common Line rates. Nevada Bell did not provide any allocation of these expenses or revenues among categories and thus has not demonstrated that it is not likely to overearn in those categories. . . .

Show Cause Response Order at para. 37 [footnote omitted]. Despite Nevada's arguments in its request for stay, and our revisiting the D&J from Nevada's Transmittal 96, we are unable to resolve these questions on the basis of the data before us.

5. Nevada states in the D&J that its

> . . . early retirement offering (ERO) resulted in a much higher than anticipated number of employees who have elected to participate. The interstate cost of this ERO is $3.8 million, and has been included in Nevada's 4th Quarter, 1989 financial results thereby reducing Nevada's rate of return.

Trans. No. 96 D&J at 1. This description does not make clear what kind of participation in the ERO Nevada anticipated, so it is impossible to calculate what part of the $3.8 million cost of the ERO was actually budgeted, and what part is excess (and requires tariff modification). Further, contrary to Nevada's assertions in its request for stay, the D&J does not explain how the $3.8 million "interstate cost of the ERO" is allocated among the three categories. [3]

6. Nevada has failed to persuade us of the validity of its assertion that the *Show Cause Response Order* is based on a misunderstanding of the relevant facts set forth in Nevada Bell's Transmittal No. 96. Nevada has not demonstrated the inaccuracy of our assertion that "Nevada provided no allocation of these expenses or revenues among categories and thus did not demonstrate that it is not likely to overearn in those categories." *See Show Cause Response Order* at para. 37. Therefore, Nevada has failed to meet the first requirement of justification for a stay, as established in Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 152 (D.C. Cir. 1958), the likelihood that it will prevail on the merits.

7. Accordingly, IT IS ORDERED that Nevada Bell's request for stay of the effective date of its tariff supplement filed in response to the *Show Cause Response Order* pending resolution of its petition for reconsideration of that Order IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Local Exchange Carrier Access Tariff Rate and Earnings Levels, CC Docket No. 90-1, Order To Show Cause, DA 90-11, released Jan. 5, 1990 (Com. Car.Bur.) (*Order To Show Cause*).

[2] Local Exchange Carrier Access Tariff Rate and Earnings Levels, Memorandum Opinion and Order, DA 90-253, released Feb. 21, 1990 (Com.Car.Bur.) (*Show Cause Response Order*).

[3] *See* Nevada Request for Stay, at 6-11. Nevada argues that the attachments to the D&J demonstrate this allocation by showing higher expenses for Common Line and Special Access for the last three quarters of 1989 than for the first three quarters of 1989; Nevada states: "Although part of the difference between expenses in the two periods may be attributed to seasonal fluctuations, most of the substantial increase in expenses was clearly due to the early retirement program costs, as Nevada Bell stated in its filing." *Id.* at 9. A generalized statement, drawn after the fact from a data attachment, of the *probable* cost of most of the increase in expense, does not rise to the level of an actual allocation of that expense among the service categories.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-101

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Stephenville, Benbrook, Jacksboro, and Wichita Falls, Texas; and Healdton, Oklahoma) RM-7062

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: February 26, 1990; Released: March 12, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of Cen-Tex Media, Inc. (petitioner), the Commission considers herein a petition for rule making seeking the substitution of Channel 289C for Channel 289C1 at Stephenville, Texas, the reallotment of Channel 289C from Stephenville to Benbrook, Texas, and the modification of the license of Station KSTV-FM to specify operation on Channel 289C at Benbrook. In order to accomplish the upgrade and the change of community of license for its station, petitioner also suggests the substitution of Channel 269A for vacant Channel 229A at Jacksboro, Texas, and the substitution of Channel 273A for vacant but applied for Channel 288A at Wichita Falls, Texas.[1] In addition, the petitioner suggests the substitution of Channel 229C2 for Channel 289C2 at Healdton, Oklahoma, and the modification of the license of Station KICM(FM) at Healdton accordingly.

2. Petitioner expresses its desire to provide Benbrook, a community of 13,579 persons, with a first local radio service. Petitioner states that Stephenville (population 11,881) will continue to receive service from petitioner's co-owned AM Station KSTV as well as Station KVQC(FM), Channel 252A. Petitioner further states that the Commission's allotment priorities will be served by providing a first local service to a community of significant size. Petitioner contends that the upgrade of Station KSTV-FM is impossible at its present transmitter site or in the immediate vicinity. Therefore, it is willing to relocate its transmitter site in order to accomplish the upgrade.

3. The separation between Stephenville and Benbrook is less than the required 270 kilometers (168 miles) required for Class C to C1 co-channel allotments. Thus the proposal is mutually exclusive with the existing station. Stephenville will retain local service from Stations KSTV(AM) and Station KVQC(FM), while the reallotment of the proposed upgraded Station KSTV-FM could provide Benbrook with its first local radio service. Therefore, we believe the public interest would be served by the proposal.

4. Channel 289C can be allotted to Benbrook in compliance with the Commission's minimum distance separation requirements at the site specified by the petitioner located 59.4 kilometers (36.9 miles) northwest of the city,[2] if channel substitutions are made at Healdton, Oklahoma, Channel 229C2 for Channel 289C2, at Jacksboro, Texas, Channel 269A for vacant Channel 229A, and at Wichita Falls, Texas, Channel 273A for vacant but applied for Channel 288A. The channel substitutions at the three communities can also be made consistent with the Commission's rules.[3] We are herein issuing a *Show Cause Order* to Lake Country Communications, Inc., licensee of Station KICM(FM) at Healdton, seeking comments as to why its license should not be modified to specify operation on Channel 229C2 in lieu of Channel 289C2. Furthermore, if this proposal is ultimately adopted, the applicants for Channel 288A at Wichita Falls will be permitted to amend their applications to specify Channel 273A without loss of cut-off protection.[4]

5. We shall propose to modify the license of Station KSTV-FM to specify operation on Channel 289C at Benbrook, Texas, as requested, in accordance with Sections 1.420(g) and (i) of the Commission's Rules. Therefore, we shall not accept competing expressions of interest in the use of Channel 289C at Benbrook nor require the petitioner to demonstrate the availability of an additional equivalent class channel at Benbrook. Petitioner has stated its willingness to reimburse Station KICM(FM) for the reasonable costs of changing channels, as required by Commission policy.

6. In view of the aforementioned, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Healdton, Oklahoma	289C2	229C2
Benbrook, Texas	---	289C
Jacksboro, Texas	229A	269A
Stephenville, Texas	252A, 289C1	252A
Wichita Falls, Texas	225C, 260C1, 277C, 288A, 292C2	225C, 260C1, 273A, 277C, 292C2

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Lake Country Communications, Inc., licensee of Station KICM(FM), Channel 289C2, Healdton, Oklahoma, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 229C2 in lieu of Channel 289C2.

8. Pursuant to Section 1.87 of the Commission's Rules, Lake Country Communications, Inc., may, not later than **May 3, 1990**, file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Lake Country Communications, Inc., to furnish additional information. If Lake Country Communications,

Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Lake Country Communications, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Samwill Broadcasting
3800 Call Field Road
Wichita Falls, TX 76308

Wrangler FM Limited Partnership
608 Dee Drive
Wichita Falls, TX 76301

Ronald M. Campagna
1608 Monroe St.
Wichita Falls, TX 76309

Good News Broadcasting
Rt. 1, Box 131
Crane, MO 65633

Fred R. Morton, Jr.
5103 N.W. Cherry
Lawton, OK 73505

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **May 3, 1990,** and reply comments on or before **May 18, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Lawrence Roberts, Esq.
Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons and Topel, P.C.
1000 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036
(Counsel for petitioner)

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in

reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The applicants are Samwill Broadcasting (BPH-871110NH0), Wrangler FM Limited Partnership (BPH-871110NF), Ronald M. Campagna (BPH-871110MZ), Good News Broadcasting (BPH-871110MQ), and Fred R. Morton, Jr. (BPH-871110NV).

[2] The proposed coordinates are 32-57-30 and 98-00-15.

[3] Channel 229C2 at Healdton can be allotted at the present transmitter site of Station KICM(FM). The coordinates are 34-02-27 and 97-20-00. The coordinates for Channel 269A at Jacksboro are 33-13-06 and 98-09-48. The coordinates for Channel 273A at Wichita Falls are 33-54-12 and 98-29-36.

[4] We shall serve the applicants with copies of this *Notice*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-102

In the Matter of

Amendment of Section 73.202(b),	RM-7127
Table of Allotments,	
FM Broadcast Stations.	
(Lake Village, Arkansas)	

NOTICE OF PROPOSED RULE MAKING

Adopted: February 26, 1990; Released: March 12, 1990

By the Chief, Allocations Branch:

1. A petition for rule making has been filed by Edna Fay Stone (petitioner) seeking the allotment of FM Channel 299A to Lake Village, Arkansas, as that community's second local FM service. Petitioner stated her intention to apply for the channel if allotted.

2. In order to avoid a conflict between this proposal and a separate proposal for Rosedale, Mississippi,[1] we have determined that Channel 278A is available for consideration at Lake Village. Channel 278A can be allotted to Lake Village in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, with a site restriction 4.4 kilometers (2.7 miles) southeast.[2]

3. In view of the fact that Lake Village could receive an additional local FM service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Lake Village, Arkansas	240A	240A, 278A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 3, 1990,** and reply comments on or before **May 18, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner and her consultant, as follows:

Edna Fay Stone P.O. Box 4625 Greenville, MS 38701	and	J. Boyd Ingram P.O. Box 73 Batesville, MS 38606 (Consultant)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules. IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the

channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Also pending before the Commission is a proposal to change the community of license for Station WZRI(FM), Channel 295A, from Cleveland to Rosedale, Mississippi, as that community's first local broadcast service, and to substitute Channel 298C2 for Channel 295A and modify the permit for Station WZRI(FM) accordingly.

[2] Coordinates used for Channel 278A at Lake Village are 33-18-08 and 91-15-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-103

In the Matter of

Amendment of Section 73.202(b), RM-7174
Table of Allotments,
FM Broadcast Stations.
(Mt. Pleasant, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 26, 1990; Released: March 12, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by KILJ, Inc. (petitioner), requesting the substitution of Channel 288C3 for Channel 288A at Mt. Pleasant, Iowa, and the modification of its license for Station KILJ to specify the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 288C3 can be allotted to Mt. Pleasant in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.8 kilometers (7.3 miles) southeast to avoid a short-spacing to Station KOKZ, Channel 289C, Waterloo, Iowa, and to the proposed allotment of Channel 288C3 at Chariton, Iowa (MM Docket 89-264) and Channel 291A at Washington, Iowa (MM Docket 89-451).[1] As requested, we also propose to modify petitioner's license for Station KILJ to specify operation on Channel 288C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Mt. Pleasant or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. We believe the public interest would be served by proposing the substitution of Channel 288C3 for Channel 288A at Mt. Pleasant, Iowa, since it could enable Station KILJ to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Mt. Pleasant, Iowa	288A	288C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 3, 1990,** and reply comments on or before **May 18, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lauren A. Colby, Esq.
10 E. Fourth Street
P.O. Box 113
Frederick, Maryland 21701
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-54-04 and West Longitude 91-26-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-283

In the Matter of

Amendment of Section 73.202(b), RM-6704
Table of Allotments,
FM Broadcast Stations.
(Elkins, West Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 23, 1990; Released: March 12, 1990

By the Chief, Allocations Branch:

1. At the request of Elkins Radio Corporation (petitioner), the Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 4972 (1989), proposing the substitution of Channel 234B1 for Channel 237A at Elkins, West Virginia. Petitioner, the licensee of Station WELK(FM) at Elkins, also requested the modification of its station's license to reflect the higher class channel. Petitioner filed supporting comments reaffirming its intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 234B1 for Channel 237A at Elkins, since it could provide the community with enhanced FM service. The substitution can be made consistent with the Commission's minimum distance separation requirements at the petitioner's specified site which is located 12 kilometers (7.4 miles) east of Elkins.[1] As requested, we are modifying the license of Station WELK(FM) to specify operation on Channel 234B1 in lieu of Channel 237A in accordance with Section 1.420(g) of the Commission's Rules.

3. Since the allotment is located within the protected areas of the National Radio Astronomy Observatory "Quiet Zone" at Green Bank, West Virginia, petitioner will be required to comply with the notification requirements of Section 73.1030(a) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 26, 1990**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Elkins, West Virginia	234B1, 257A[2]

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Elkins Radio Corporation for Station WELK(FM), Channel 237A, Elkins, West Virginia, IS MODIFIED, to specify operation on Channel 234B1 in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The restricted site coordinates are 38-56-14 and 79-42-41. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may implement this allotment by availing itself of the provisions of Section 73.213 (c)(i) of the Commission's rules. *See* 47 CFR § 73.213(c).

[2] The Commission is currently considering a proposal to substitute Channel 255B1 for Channel 257A at Elkins. *See Notice of Proposed Rule Making and Order to Show Cause* in MM Docket No. 89-580, 4 FCC Rcd 8704 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-121

In the Matter of

Amendment of Section 73.202(b), RM-7196
Table of Allotments,
FM Broadcast Stations.
(West Liberty, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 26, 1990; Released: March 12, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by RAY Broadcasting Corporation (petitioner), requesting the allotment of Channel 282A to West Liberty, Ohio, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Channel 282A can be allotted to West Liberty in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence in the allotment is required since West Liberty is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 282A to West Liberty, Ohio, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
West Liberty, Ohio	--	282A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 3, 1990,** and reply comments on or before **May 18, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John G. Johnson, Jr., Esq.
Bryan, Cave, McPheeters & McRoberts
1015 - 15th Street, N.W., Suite 1000
Washington, D.C. 20005-2689
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-15-06 and West Longitude 83-45-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-120

In the Matter of

Amendment of Section 73.202(b), RM-7218
Table of Allotments,
FM Broadcast Stations.
(Taos, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 23, 1990; Released: March 12, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Taos Communications Corp. (petitioner), requesting the substitution of Channel 268C1 for Channel 268C2 at Taos, New Mexico, and the modification of its license for Station KTAO(FM) accordingly.[1] Petitioner states that it will file an application for Channel 268C1, if allotted. Chanel 268C1 can be allotted to Taos in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in its pending application for Channel 268C2 (BPH-891128IF).[2]

2. We believe the public interest would be served by proposing the substitution of Channel 268C1 for Channel 268C2 at Taos, New Mexico, since it could enable Station KTAO(FM) to expand its coverage area. As requested, we also propose to modify petitioner's license for Station KTAO(FM) to specify operation on the higher powered channel. In accordance with Section 1.420 of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 268C1 at Taos or require the petitioner to demonstrate the availability of an equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Taos, New Mexico	260A, 268C2	260C2, 268C1[3]

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 3, 1990,** and reply comments on or before **May 18, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robyn G. Nietert, Esq.
Brown, Finn & Nietert, Chartered
1920 N Street, N.W., Suite 660
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Station KTAO(FM)'s license was modified to specify operation on Channel 268C2 in lieu of Channel 269A by *Report and Order* in MM Docket 88-589. *See,* 4 FCC Rcd 6204 (1989).

[2] The coordinates for this allotment are North Latitude 36-14-48 and West Longitude 105-39-15.

[3] The Commission has proposed the substitution of Channel 260C2 for Channel 260A at Taos at the request of Taos County Radio. *See,* 4 FCC Rcd 5607 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-98

In re Applications of

RANIA S. LEVAN (hereafter "Levan") File No. BPH-880219MC

JOHN ANTHONY BULMER (hereafter "Bulmer") File No. BPH-880219MK

For Construction Permit for a
New FM Station on Channel 234A; 94.7 MHz
in Lake Luzerne, New York

HEARING DESIGNATION ORDER

Adopted: February 22, 1990; Released: March 12, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Levan*. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Levan would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

3. *Bulmer*. The Bulmer application being considered in this proceeding conflicts with a pending Rule Making proceeding to substitute 1st adjacent Channel 233C3 for Channel 233A at Rutland, Vermont per MM Docket 89-518. The Rule Making proceeding commenced after Bulmer had filed his application. Consequently, Bulmer's application met all the spacing criteria of 47 C.F.R. § 73.207(a) and was accepted for filing. Accordingly, we will designate this application for hearing. However, if the construction permit is issued to Bulmer, it will be conditioned upon the outcome of the Rutland, Vermont, Channel 233C3 Rule Making proceeding.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Levan would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if either.

7. IT IS FURTHER ORDERED, That if a construction permit is issued to Bulmer in the Lake Luzerne, New York proceeding, it will be conditioned upon whatever action is taken in the Rule Making to assign Channel 233C3 to Rutland, Vermont.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] An application by Lake Luzerne FM Limited Partnership (BPH-880219MM) was dismissed on January 31, 1990 by the Chief, FM Branch at the request of the applicant.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-364

In re Applications of

ADLAI E. STEVENSON IV — File No. BPH-870909MK

Louise B. Toft and Stuart A. Toft d/b/a ALLIANCE BROADCASTING OF CHAMPAIGN COUNTY — File No. BPH-870910MT

For a Construction Permit For
a New FM Station on Channel 290A
in Mahomet, Illinois

Appearances

Harry C. Martin, *Matthew McCormick*, and *Troy F. Tanner*, on behalf of Adlai E. Stevenson IV; and *Eric S. Kravetz* and *Stephen E. Coran*, on behalf of Alliance Broadcasting of Champaign County.

DECISION

Adopted: March 2, 1990; Released: March 16, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member BLUMENTHAL:

1. The Review Board has before it: (1) the *Initial Decision*, 4 FCC Rcd 7153 (1989) (*I.D.*) of Administrative Law Judge Walter C. Miller (ALJ), granting the application of Adlai E. Stevenson IV (Stevenson) for a Construction Permit for a new FM station at Mahomet, Illinois, and denying the mutually exclusive application of Alliance Broadcasting of Champaign County (Alliance); (2) exceptions filed by Alliance, and reply exceptions by Stevenson; and (3) a contingent petition to reopen the record and to enlarge the issues filed November 27, 1989 by Alliance (and pleadings responsive thereto). An oral argument was held before the Board February 16, 1990. Based on our review of the *I.D.*, in light of the pleadings, the oral argument, and our own independent examination of the record, we affirm the ALJ's disqualification of Alliance for want of a viable transmitter site, and his resultant grant of Stevenson's application.

SITE AVAILABILITY ISSUE

2. This case turns on whether the ALJ erred in concluding that Alliance did not have "reasonable assurance" of its transmitter site when it so certified in an application amendment filed on November 20, 1987. As had Stevenson initially, Alliance's amendment specified land belonging to one Seely Johnston. The Alliance amendment had been necessitated by its discovery, on the eve of the November 20, 1987 filing deadline for curative amendments, that the site it had originally specified in its application was two miles short-spaced to a station in Monticello, Illinois, and therefore unacceptable. *I.D.*, paras. 8, 14.

3. However, in a motion to enlarge issues filed September 26, 1988, Stevenson submitted a declaration from the site owner, Seely Johnston, attesting that (emphases added):

> In the fall of 1987, I was contacted at my store by a man and a woman who told me they also were applying for the Mahomet station and that they intended to specify the same site as Mr. Stevenson -- that is my property. I told them I was busy and that I couldn't talk. Some time later, the woman returned. *I told her that I had a written understanding with Mr. Stevenson and that I would under no circumstances negotiate with any other person or persons until Mr. Stevenson was no longer interested in the property*. Moreover, I told her that even then I would only *talk* with other applicants regarding the site and would not necessarily enter into an understanding or agreement with another applicant. In short, I have not made my property available to any applicant for the Mahomet FM station other than Mr. Stevenson. Any representation to the contrary is untrue.
>
> *I have been advised that Louise B. Toft and Stuart A. Toft d/b/a Alliance Broadcasting of Champaign County have represented to the Federal Communications Commission that I have given them reasonable assurance of the availability of my property for the construction of their radio tower. As indicated above, that is not true.* While I presume that the two individuals who contacted me last fall were the Tofts, I did not give them, or the woman when she returned, assurance of any kind that my property would be available to them if they were successful in obtaining the station. There was no exchange of letters or other writings between the Tofts and myself. (In contrast, the understanding between Mr. Stevenson and myself was in writing.) *The Tofts' proposed use of my property is without authorization.*

Based thereon, site availability (and false site certification) issues were added against Alliance. *Memorandum Opinion and Order*, FCC 88M-3922, released November 17, 1988 (ALJ).

4. Seely Johnston was called to testify at the hearing on the site issues, and he again averred (Tr. 71)[1]:

> Q. Did you give Mrs. Toft or anybody connected with Alliance Broadcasting permission to specify your farm as a transmitter site for her radio station?
>
> A. Never at any time.

Nevertheless, Alliance's Louise B. Toft contended that Johnston did assent to her specification of his land. Despite Johnston's adamantine denials of any offer of his

land, Toft sought to corroborate her version of events by alleging that on the date of their second meeting (November 17, 1987), Johnston went to the rear of his establishment, Toft heard (what she believed was) a copying machine, and that Johnston supplied her with a copy of his actual site agreement with Stevenson. *I.D.*, para. 24. But Johnston swore he gave her no copy; and that, indeed, he has no copying machine at his store. *Id.*, para. 28. Next, Toft alleged that she prepared a draft agreement between Alliance and Johnston closely tracking his prior written agreement with Stevenson; but the two specimens offered here differ markedly in format and substance. *Compare* Alliance Exh. 4 *with* Stevenson Exh. 5.[2] What is more, Toft now contends that she cannot locate the copy of the Stevenson agreement Johnston allegedly provided and that she closely "tracked" in her own Alliance draft. *Id.*, para. 27. Regardless, Toft next submits that she carefully and personally dispatched a copy of her draft agreement with Johnston to him, via Alliance employee Tamara Duvall; but Duvall could not recollect either being asked to deliver the draft, or delivering it. *Id.*, para. 33. And, Johnston here avowed that he received no such draft. *Id.*, para. 29. Finally, Toft asserts that although Johnston never executed or returned the purported draft agreement (allegedly dispatched especially to him), she never followed-up to determine whether he would approve the draft agreement, wished to modify its purported terms, or had ever even *received* it. *Id.*, para. 33. The ALJ found Johnston's testimony on these matters more credible than Toft's, making parallel demeanor findings.

5. The law requires that credibility findings of an ALJ be given considerable deference, unless those findings are in irreconcilable conflict with the other record evidence. *TeleSTAR, Inc.*, 2 FCC Rcd 5, 17 (Rev. Bd. 1987) (subsequent history omitted); *see also Opal Chadwell*, 2 FCC Rcd 5502, 5504 (Rev. Bd. 1987) (credibility findings of ALJ generally control, absent "countervailing record evidence" demonstrating "reversible error in that ALJ's credibility determinations," quoting *WEBR, Inc. v. FCC*, 420 F.2d 158, 162 (D.C. Cir. 1969) (subsequent history omitted)); *Broadcast Associates of Colorado*, 104 FCC 2d 16, 19 (1986) ("absent extrinsic evidence to the contrary, we believe that the ALJ's judgment . . . is entitled to great weight") (modifying 100 FCC 2d 616 (Rev. Bd. 1985)); *Signal Ministries, Inc.*, 104 FCC 2d 1481, 1486 (Rev. Bd. 1986) (absent "patent conflicts with the record evidence, the Commission accords special deference to [an ALJ's] credibility findings since the trier of fact has had a superior opportunity to observe and evaluate a witness's demeanor and to judge his/her credibility"). We should not overturn the credibility findings of an ALJ except in the face of "substantial [record] evidence." *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985). Here, Toft's uncorroborated and self-serving claims not only conflict squarely with those of Johnston,[3] her attempts at corroboration of her version of events all faltered badly. In fact, the record on Toft's "corroboration" of her version of events only casts further doubt on her credibility.

6. But even if we accepted Toft's version of the facts at nearly its most favorable, Alliance would yet fall critically short of the Commission's legal standard of "reasonable assurance" of a transmitter site. Thus, Toft claims that after she suggested to Johnston that he could promise her "reasonable assurance" of the same site as Stevenson, Johnston "acknowledged her proposal with a short comment like 'I see.'" Alliance Exh. 4 (Louise Toft Affidavit at 5). Toft also deposed that Johnston said (or implied) that he wanted a written agreement before acquiescing, from which demand Toft inferred almost a tacit agreement regarding the availability of the Stevenson site. *Id.*; *see also* Tr. 298. Still, these brief exchanges were legally insufficient to provide Alliance with a claimable site. "An applicant cannot merely have vague discussions with a site owner, negotiate no *bona fide* arrangement, and [then] earnestly represent 'reasonable assurance' of that site." *Dutchess Communications Corp.*, 101 FCC 2d 243, 253 (Rev. Bd. 1985); *see also William F. Wallace*, 49 FCC 2d 1424, 1427 (Rev. Bd. 1976) ("mere possibility that the site will be available will not suffice"); *El Camino Broadcasting Corp.*, 12 FCC 2d 25, 26 (Rev. Bd. 1968) ("mere fact that the property owner has indicated that he will discuss the possibility of a lease at some future date does not, absent some indication that he is favorably disposed toward making such an arrangement, provide any more assurance than an unrejected offer"). At minimum, "a meeting of the minds resulting in some firm understanding as to the site's availability is essential." *Genesee Communications, Inc.*, 3 FCC Rcd 3595 (Rev. Bd. 1988). Clearly, the cryptic communications, even as portrayed by Toft, did not establish with Johnston a "firm understanding" that his site would be available to Alliance. And, we have emphasized that an applicant cannot merely assume to the site on which a competitor has an outstanding agreement. *South Florida Broadcasting Co., Inc.*, 99 FCC 2d 840, 846-848 (Rev. Bd. 1984).

7. Having correctly determined that Alliance lacked any assurance of the Johnston transmitter site, "reasonable" or otherwise, the ALJ properly denied Alliance's amendment, filed October 26, 1988, to specify to a new transmitter site, *see Memorandum Opinion and Order*, FCC 88M-3873 released November 15, 1988 (ALJ). Where it appears that an applicant did not have "reasonable assurance" of a site to begin with, it is not permitted to amend late in the process because it cannot meet the rigorous "good cause" test specified in 47 CFR § 73.3522. *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983), *rev. denied*, FCC 84-119, released April 2, 1984, *aff'd sub nom. Royce International Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985)(table), *cert. denied*, 474 U.S. 995 (1985). *See also Port Huron Family Radio, Inc.*, 4 FCC Rcd 2532, 2535 (Rev. Bd. 1989)(and cases cited therein) ("law is clear that an applicant will not be permitted to amend where it did not have the requisite reasonable assurance to begin with . . ."). Because we agree that Alliance never had "reasonable assurance" of the Johnston site, let alone faint hope, its need to amend later to yet a *third* site was hardly "unforeseeable." *Shoblom Broadcasting; California Broadcasting Corp.*, 90 FCC 2d 800, 808 (1982) (beyond ordinary 6-point "good cause" test, engineering amendments must further demonstrate that applicant could not reasonably have foreseen need to amend). And, in light of Alliance's disqualification on the basic site issue, we need not go further to determine whether Alliance's conduct amounted to actionable misrepresentation. *Dutchess Communications, supra*, 101 FCC 2d at 254 n.31.

PETITION TO ENLARGE ISSUES

8. On October 24, 1989, some three weeks after the issuance of the I.D. in this case, Stevenson lodged a civil action against the Tofts, individually, and Alliance in an Ohio state court, alleging misrepresentation in this federal

licensing proceeding and seeking $15,000 in damages to cover Stevenson's legal expenses in prosecuting his instant FM radio application.[4] Based upon this collateral legal action, and citing *James C. Sliger*, 69 FCC 2d 277 (Rev. Bd. 1977), *Rocket Radio, Inc.*, 56 FCC 2d 238 (Rev. Bd. 1975), and WI00, Inc., 28 RR 2d 685 (Rev. Bd. 1973), Alliance seeks an issue against Stevenson to determine whether he should be disqualified for the use of harassing or intimidating tactics to coerce Alliance to either settle this case favorably, or to abandon altogether its application.

9. We will reject Alliance's petition. First, we find that the cases relied upon by Alliance are inapposite here. All three involved either furtive, improper, or unethical conduct of a character not alleged against Stevenson. *Sliger* dealt with a threatened "strike" application. In Rock et, an applicant hired local police officers to "question" its opponent's proposed employees; the officers intimidated their targets by demanding drivers' licenses, social security numbers, etc., as if they were acting officially. In WI00, an applicant sought to hire (for a greater stipend) an appraisal expert who had supplied evidence for its competitor.

10. Second, and more importantly, the Commission has several times spoken to the question of whether the filing of a lawsuit (or the threat thereof) against a licensing antagonist is grounds for a disqualifying issue. In *Fort Collins Broadcasting Co., Inc.*, 38 FCC 2d 707, 711-712 (1972), the Commission stated that:

> licensees, as do all individuals, have the right to pursue any legal remedies they may have at their disposal . . . . But we do stress that . . . licensees should exercise great care and caution in any statements or threats to petitioners that if they file or maintain their filing, they may be subject to suit . . . . In our view, the most appropriate course is therefore generally to refrain from any threat of suit by a broadcast licenseee in these circumstances at least until the matter is concluded by the Commission.

However, in that "case of first impression," the Commission did not add an issue because it found that the licensee threatening suit believed in good faith that its antagonist had civilly wronged it, and that it could properly seek private legal redress. *Id.* In *Patrick Henry*, 69 FCC 2d 1305 (1978), the Commission did add an issue where the threat of a lawsuit was accompanied by decided intimations of physical violence, if its antagonist did not withdraw. But, there again, the Commission recalled its *Ft. Collins* language and went on to "stress that we in no way wish to cast a chilling effect on those --licensees or others -- who seek to exercise their rights to obtain legal redress for alleged damages incurred." *Id.*, at 1314.

11. Our review of the foregoing authorities persuades us that the collateral filing of a civil lawsuit, without more, is not grounds for adding a disqualifying issue,[5] a point generally accepted by Alliance counsel at oral argument. *See* Tr. 634-635, 637-638. Without commenting in the slightest on the merits of Stevenson's state court complaint, we find no basis upon which to infer *mala fides* on his part. Alliance does not here contend that Stevenson's civil action is patently frivolous or wholly vexatious, and we are provided with no authority to support any such inference.[6] Nor, as in *Patrick Henry*, does it allege threats beyond the face of the suit itself.[7] Consistent with the language of *Patrick Henry* and *Ft. Collins*, we do not find that the filing of a collateral civil lawsuit is, *per se*, grounds for questioning an applicant's basic character qualifications; and under the circumstances presented here, we will deny the Alliance petition.

12. ACCORDINGLY, IT IS ORDERED, That the Contingent Petition to Reopen Record and to Enlarge Issues filed November 27, 1989 by Alliance Broadcasting of Champaign County IS DENIED; and its Petition to Leave to Amend filed December 28, 1989 IS GRANTED and its amendment IS ACCEPTED;

13. IT IS FURTHER ORDERED, That the application of Adlai E. Stevenson IV (File No. BPH-870909MK) for a new FM station on Channel 290A at Mahomet, Illinois IS GRANTED, and the application of Alliance Broadcasting of Champaign Country (File No. BPH-870910MT) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Seely Johnston went on to testify (Tr. 115-118):

> Q. Yes. The first meeting that you had with her when she may have been with somebody else as well.
>
> A. Well, she was with somebody else. That man. They came into my store and if you can picture a room about half this size full of hockey equipment and ice skates and everything people coming in wanting to get waited on -- and she said, my name is so-and-so, can I visit with you a minute. You do have a farm out by Mahomet. Now, you can quote me or not. I don't know what she said at the time. I just know she introduced herself. I didn't know her from Mrs. Jones or anybody else. And I said, well, I'm kind of busy, dear. If it's anything important I'll ask you to come back tomorrow or the next day.
>
> She said, well, let me just tell you a little bit about what we want. And so she was right in front of me so I had a perfect chance to know just exactly what she was saying.
>
> She said, we want to put a radio antenna and station, have a station there, and we would like to lease your farm. I said, well, I'd be glad to talk to you but it's already promised; I've already promised, gave my word, and also signed a paper with Mr. Stevenson. She said, you have; well, it wouldn't hurt if you have two options on it. Give us one also on the same one. I said, why I don't do business that way . . . .
>
> * * *
>
> But I did tell her I'll give you the time of day; I'll try to learn something myself; so I will entertain another meeting if you would like to come back and I will then go into it and listen to what you have to say. With that, why, they left.

I had explicity to start with said, no, but I will be courteous enough to listen. I do that with every salesman even though I'm not going to buy his product. I think it's a courtesy to anybody that walks in the door you should listen.

Q. Okay. And that was the end of the first meeting?

A. Pardon me?

Q. That was the end of the first meeting?

A. Yes.

Q. Did you then have a second meeting with Mrs. Toft?

A. Soon after. Now, --

Q. Did you --

A. If you would ask me was it the next day on the following, I don't know. But I know it was right away, soon, right after that. And she came alone.

Q. Okay. And can you explain what happened at that meeting?

A. When she came alone, we visited. And she said, what will Mr. Stevenson do for you that I can't do? I will give you whatever Mr. Stevenson's offered. I said, well, that would be fine but I have my word of honor and I also have signed that he is the only one. So I'll talk with you and listen to you but it's to no avail, it's taking my time.

[2] The only patent coincidence between the actual Stevenson agreement and Alliance's draft is the specification of $800 per month as the rental price, a figure Johnston says he did reveal orally to Toft.

[3] While Johnston did admit a respect for Stevenson's grandfather, there is no evidence that he had any reason to dissemble, particularly since his testimony might have cost him $800 per month in rental fees, had Alliance prevailed.

[4] *Stevenson v. Toft*, No. 89-L-211 (McLean County Ct. Ill., filed October 24, 1989). The suit alleges that Alliance's site misrepresentations caused Stevenson to expend needlessly large amounts of money to support his FCC application.

[5] *But cf. Coalition for the Preservation of Hispanic Broadcasting v. FCC*, No. 87-1285, slip op. at 6, 24-25 (D.C. Cir. January 12, 1990). There the majority noted that the licensee had filed collateral anti-trust suits against a licensing antagonist, though the ALJ had refused to add an issue based thereon.

[6] We note again that the *I.D.*, finding misrepresentation on the part of Alliance, was issued three weeks prior to the filing of Stevenson's civil complaint. And, the Commission has stated that "[a]n initial decision is not a mere report to be arbitrarily disregarded." *Ocean Pines FM Partnership*, 4 FCC Rcd 3490, 3491 (Rev. Bd. 1989), quoting *Stereo Broadcasters, Inc.*, 74 FCC 2d 543, 545 (1979), *aff'd*, 652 F.2d 1026, 1030 (D.C. Cir. 1981). However, we also remind that we have not formally affirmed the *I.D.* on the misrepresentation issue; and (almost needless to observe) nothing determined by the FCC would in any event bind a local court on a civil suit of this nature.

[7] While Alliance implies that the suit was coincident to a failure of settlement negotiations, Pet. at 2, Stevenson avers that there had been no settlement negotiations since January 18, 1989, approximately nine months before the filing of the suit (and prior even to the hearing). *See* Stevenson Opposition filed December 20, 1989, Attachment B. In fact, settlement efforts are encouraged by the Commission and Congress, which have recognized that:

> dismissal agreements generally serve the public interest because they often avoid lengthly appeals, thus expediting the start of the new broadcast service involved in the proceeding.

H.R. Rep. No. 765 (Conf. Rep.), 97th Cong., 2d Sess. 50 (1982); Communications Amendments Act of 1982, Pub. L. 97-259, 96 Stat. 1087 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-358

In re Applications of

TEXAS COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870710MI
BEAUMONT SKYWAVE, INC.	File No. BPH-870710NA
CHM BROADCASTING	File No. BPH-870710NC

For a Construction Permit for a New
FM Station on Channel 273C2
Beaumont, Texas

Appearances

Thomas L. Siebert, Stephen Diaz Gavin, and *J. Jeffrey Craven* on behalf of Texas Communications Limited Partnership; *Donald J. Evans* and *Peter D. Shields* on behalf of Beaumont Skywave, Inc.; *Eric L. Bernthal, Everett C. Johnson, Jr.*, and *Carol Ann Siciliano* on behalf of CHM Broadcasting; and *Y. Paulette Laden* on behalf of the Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD J. KUHLMANN

Issued: March 5, 1990; Released: March 14, 1990

1. The three applications listed in the caption and two additional applications, now dismissed, were designated for hearing on August 8, 1988, to consider on a comparative basis which mutually exclusive proposal would best serve the public interest. *Hearing Designation Order*, 3 FCC Rcd 4768 (1988). The following issues will be considered in this decision:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Texas Ltd. and CHM would constitute a hazard to air navigation.

2. (1) To determine whether CHM misrepresented in its application that it was financially qualified to construct and operate the proposed Beaumont, Texas FM station and whether those facts warrant CHM Broadcasting's disqualification.

(2) To determine whether CHM is financially qualified.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. A prehearing conference was held on October 14, 1988. *Order*, FCC 88M-2612 released August 12, 1988; Tr. 1-13. Written testimony was exchanged on April 17, 1989 and September 8, 1989. Hearing sessions to cross-examine on the written testimony were held in 1989 on May 1 (Tr. 15-272/279), May 2 (Tr. 280-561/599), and May 3 (Tr. 600-775) and September 21 (Tr. 776-1006), September 22 (Tr. 1007-1122), and September 25 (Tr. 1123-1322). The hearing record was initially closed on May 3, 1989 (*Order*, FCC 89M-1362, released May 5, 1989) and finally on September 25, 1989. *Order*, FCC 89M-2353, released September 27, 1989.

FINDINGS OF FACT

Issue 1: To determine the possibility of whether the tower height and location proposed by Texas, Ltd. and CHM would constitute a hazard to air navigation.

Texas, Ltd.

3. Texas, Ltd. learned in 1987, through its engineers, Sachs-Freeman, that the FAA had preliminarily determined that Texas, Ltd.'s proposed tower site would be a hazard to air navigation. Tr. 62, 66-67. Sachs-Freeman represented Texas, Ltd. in all its dealings with the FAA and, in its application to the FAA, Texas, Ltd. had advised the FAA to communicate with Sachs-Freeman directly. Tr. 63. According to Andre Woodson, Texas, Ltd.'s general partner, Sachs-Freeman never advised him or the applicant's legal counsel about the FAA's decision. Tr. 62. Mr. Woodson conceded that the applicant's engineering firm had not been diligent in resolving Texas, Ltd.'s tower problem. Tr. 65. Mr. Woodson testified that his engineers may have been informed about the problem with the site in September 1987, just two months after Texas, Ltd. filed its application. Tr. 63. Mr. Woodson did not call the engineers to inquire about the FAA's consideration of Texas, Ltd.'s site proposal. Tr. 66. In August 1988, he discovered from the HDO in this case that an air hazard issue had been designated against Texas, Ltd. Tr. 63. Thirteen months after filing, Mr. Woodson and Texas, Ltd.'s attorneys decided to hire another engineering firm. Tr. 65-66.

4. Mr. Woodson was aware that the site Texas, Ltd. had designated was the same as that of Ronald Mathis, one of the original applicants. Tr. 71. He also knew that Mr. Mathis amended his application to designate a new site because the FAA had found that the site posed a hazard to air navigation. Tr. 74. He was aware that he was "in the same situation." Tr. 74. He also saw Mathis' amendment and the opposition to it, which was filed in September 1988. Tr. 76. While Mr. Woodson failed to provide specific dates or the general time when he became aware of Mathis' proposal to change sites, Texas, Ltd.'s counsel learned about the FAA's decision in August 1988. Tr. 62.

5. Mr. Woodson testified that Texas, Ltd.'s petition for leave to amend to change sites was filed around September 1988. Tr. 78. Actually, it was filed, bearing Mr. Woodson's signature, two weeks before the hearing, on

April 19, 1989. Skywave Exh. 6. Texas, Ltd.'s new site proposal is for the site selected by Skywave. Mr. Woodson could not explain why Texas, Ltd. waited nearly eight months (from August 1988 to April 1989) to change to a site designated by Skywave. Tr. 85. On May 10, 1989, Texas, Ltd. received a Notice of Hazard Determination from the FAA, advising Texas Ltd. that a tower on its new site would exceed FAA height limitations by nine feet and also that it would cause an electromagnetic intermodulation interference problem because of the tower's proximity to two other broadcast towers. The FAA also advised Texas, Ltd. that it might request reconsideration of the determination upon the relocation of either of the two towers.

CHM

6. CHM has been unable to obtain FAA clearance for its tower. Its proposed tower height is excessive and its signal may cause electromagnetic interference. CHM learned about the air hazard problems with its site when it received a document from the FAA in July 1988. Tr. 550. CHM was informed that its proposed site exceeded the standards of part 77 of the FAA regulations and would be identified as an obstruction to air navigation because its height exceeded 500 feet above ground level. Tr. 554, 555. But the FAA also advised CHM that a preliminary study indicated that CHM's proposal would not affect any existing or planned instrument flight rule operations, procedures or minimum flight altitudes. Skywave Exh. 8, at 2. CHM requested that the FAA conduct a further study of its tower proposal. Tr. 554-55, 555-56. The FAA orally advised CHM, through counsel, that the tower's height would not be a problem but that the FAA had identified a new problem associated with electromagnetic interference that would preclude a no hazard determination. Tr. 606-07, 607-08, 693.

7. On April 26, 1989, counsel for CHM received, by telecopy, a determination of hazard to air navigation issued by the FAA. Skywave Exh. 9. The determination confirmed what the FAA had earlier told CHM's counsel. The tower would penetrate reserved air space by 15 feet, but it would not be in a regularly utilized visual flight rule route. *Id.*, at 2. The FAA found that three-frequency intermodulation interference would be caused by the conjunction of CHM's tower and two existing towers. *Id.*, at 2-3. The FAA determined that the proposed construction would pose an air safety hazard. *Id.*, at 2. The FAA advised CHM that it could petition the FAA for reconsideration of this hazard determination immediately upon relocation of either of the two interfering stations. *Id.*, at 3.

Skywave

8. Skywave amended its application on May 4, 1989, the day after the hearing, to report that the FAA had reversed the determination of no hazard it had previously made to Skywave. Petition for Leave to Amend, filed May 4, 1989 by Skywave (*granted, Memorandum Opinion and Order*, FCC 89M-1985, released July 28, 1989, at 6.). The FAA found that Skywave would penetrate reserved air space by 12 feet and cause electromagnetic interference.

Issue 2: To determine whether CHM misrepresented that it was financially qualified when it filed its application and whether CHM is financially qualified.

CHM's Financial Certification

Cost Estimates

9. CHM general partner, Joseph Mims, prepared a budget for the FM station at Beaumont, which he shared with all of his partners. Tr. 1010; CHM Financial Exh. 1A. The CHM partners reviewed and discussed Mr. Mims' budget at a meeting held in June 1987. Tr. 960. During a July 1987 trip to Washington, D.C., the budget was officially adopted by CHM partners as the budget for the station. Tr. 961-62; CHM Financial Exh. 4, at 2. It was adopted, however, with the understanding that it did not necessarily reflect CHM's proposal because Mr. Mims had made up the budget for a station he planned for Beaumont before CHM was formed. Tr. 962. For example, Amelie Cobb pointed out that no provision had been made in the budget for salaries for her and Ms. Hatcher. Tr. 963. No provision was made in the budget for the repayment of the already $200,000 in loans made "on commercially reasonable terms" by Kent Foster to the partnership. Texas, Ltd. Exh. 9; Tr. 1227, 1014. Nevertheless, Beverly Hatcher, who certified CHM's financial qualifications, stated that she believed that Mr. Mims' estimates were valid for CHM's proposal and she relied on those estimates. Tr. 1070.

10. CHM's budget (CHM Financial Exh. 1A) estimates start-up expenses for construction to be $335,000 and operating expenses to be $49,062 per month. When Ms. Hatcher testified, she indicated that it was intended that the applicant would provide about $150,000 for construction and the rest would be in the form of a loan from the equipment vendor, a bank, or the limited partner, Kent Foster. Tr. 1065-66, 1072, 1073, 1120. Amelie Cobb testified that the applicant would need $350,000 and that amount would come from a bank loan. Tr. 972. Joseph Mims claimed that the plan was to use $150,000 to $200,000 of the $350,000 loan for operating expenses in the first three months. Tr. 1051. Mr. Mims told Mr. Crouch, Chairman of the Board at the East Texas State Bank, where he and Mr. Foster requested a loan letter, that it would cost $535,000 to construct and operate for one year. Tr. 1023.

Reasonable Assurance of Availability of Funds

11. When CHM certified its financial qualifications, it relied on a soon to be issued letter from the East Texas State Bank for $350,000. Tr. 1095, 1118; CHM Financial Exh. 2, at 7; CHM Financial Exh. 1C. Kent Foster, CHM's limited partner, had also promised to provide the construction and operation costs which could total $500,000 or more, CHM believed. Tr. 1039-40, 1074, 1075, 1084; CHM Financial Exh. 1, at 8; CHM Financial Exh. 2 at 3; CHM Exh. 3, at 3-4; CHM Financial Exh. 4, at 2.

12. Kent Foster and Joseph Mims obtained the loan assurance letter from the East Texas State Bank and showed it to Beverly Hatcher some time after she had certified CHM's application. Tr. 1077-79. Mr. Foster and Mr. Mims met with the Chairman of the Board of the East Texas State Bank, Raymond Crouch, who is Mr.

Foster's brother-in-law, in late June or early July 1987, before CHM filed its application. CHM Financial Exh. 1, at 8-9; CHM Financial Exh. 4, at 5. Mr. Mims represents that he told Mr. Crouch that the applicant intended to buy its equipment on time. (Tr. 1023, 1065) and he explained to him that the bank would not have a first security interest in the equipment. Tr. 1065. Because Mr. Foster promised to pledge his personal assets, Mr. Crouch recommended that the request be granted. Tr. 861-62. He presented his recommendation to the bank's board immediately following his meeting with Messrs. Mims and Foster.

13. Mr. Crouch based his assessment of Mr. Foster's pledge on Mr. Foster's December 31, 1985 financial statement and a credit report. Tr. 850, 855-56. He also considered the joint financial statement of Amelie Cobb and her spouse that was in the bank's files, Tr. 857-58, and took note of Mr. Mims' radio experience. Tr. 859. The loan committee approved the request and Mr. Crouch immediately advised Mr. Foster and Mr. Mims. Tr. 878. In October 1988, Mr. Foster obtained another letter from the East Texas State Bank, which acknowledged that the bank had issued letters of assurance for CHM and three other entities in which Mr. Foster was a limited partner. Tr. 1153-54; CHM Financial Exh. 9B; CHM Financial Exh. 4, at 11-12.

14. Even though he would not have done so ordinarily, Mr. Crouch consulted the loan committee about the initial Bank letter to CHM because Mr. Foster was a 1.6% shareholder and director of the bank and also voted 82% of the bank's stock by proxy. Tr. 866-67. The letter was shown to the bank's attorney for his review and approval. Tr. 864-65. In the letter the bank expresses a willingness "to consider" the loan. CHM Financial Exh. 1C. The bank specifically stated that the letter did not represent a contractual commitment and it was not binding on the bank. *Id.* The bank did state that it was its "intention and desire to make the loan on the terms named." *Id.*

15. Two months following the issuance of the July 7, 1987 letter to CHM by the East Texas State Bank, the bank received an unfavorable examination by the bank's inspectors. Mr. Foster claims he did not know that the bank was having financial difficulty until August 1988. Tr. 1141-43. There is evidence that Mr. Foster's mother and sister were aware of the difficulties a year earlier. Tr. 870, 872-73. Mr. Foster did not tell the CHM owners that the bank had failed until it officially failed in November 1988. None of CHM's partners asked the successor bank about the status of the loan letter from East Texas State Bank. Tr. 986, 1105. A new letter was not obtained until March 1989. That letter, from the National Bank of Washington, was also for $350,000. CHM Financial Exh. 4, at 14; CHM Financial Exh. 4A. Mr. Foster showed National Bank of Washington a December 31, 1988 financial statement, Tr. 1203, and his Treasury certificates, worth one million dollars, and indicated that he had several hundred thousand dollars in certificates of deposit. CHM Financial Exh. 4, at 13.

16. Mr. Foster also promised CHM to provide the necessary money. He discussed with Ms. Hatcher, Mr. Mims, and Ms. Cobb his investments and assets, including his cellular telephone interests and his certificates of deposit, although he did not indicate how much money he had in CDs. CHM Financial Exh. 4, at 3; Tr. 1036, 1037, 1040. Ms. Cobb believed that Mr. Foster was wealthy and she told Mr. Mims and Ms. Hatcher about her perception. Tr. 1090; CHM Financial Exh. 1, at 2; CHM Financial Exh. 3, at 4. Ms. Hatcher believed that the East Texas State Bank letter demonstrated that the bank believed Mr. Foster was a good credit risk and that his assets were liquid. Tr. 1085-86. CHM Financial Exh. 1, at 7. CHM Financial Exh. 2, at 4. At the time Mr. Foster made his promise to provide CHM with $350,000, he had $550,000 in cash, securities, and certificates of deposit and a note payable to East Texas State Bank for $301,184. CHM Financial Exh. 4B. Mr. Foster also claimed at the hearing that in July 1987 he had real estate interests that could realize $1,225,000 within 30 days. CHM Financial Exh. 6, at 2-3. When CHM filed its application on July 1, 1987, Mr. Foster was obligated to provide $1 million to other broadcast applicants. CHM Financial Exh. 4E. In November 1988, when the bank became insolvent, Mr. Foster had liquid assets of approximately $1 million. CHM Financial Exh. 4C. In March and September, 1989, he had approximately the same amount and a net worth in excess of $10 million. CHM Financial Exh. 4 D; CHM Financial Exh. 4, at 17. Mr. Foster testified that he is willing to borrow against or liquidate his assets to meet his obligations. CHM Financial Exh. 4, at 18. Mr. Foster claims he has always had enough liquid assets to meet his obligations. *Id.*

17. Mr. Foster has obligations to his various broadcast applications in excess of four and one-half million dollars. CHM Financial Exh. 4F. Mr. Foster's March 1989 financial statement, CHM Financial Exh. 4D, shows $1,358,500 in liquid assets. He submitted appraisals for non-liquid assets of $1,632,000, which includes $407,000 in art work. *Id.*

18. Ms. Hatcher testified that she was relying on the bank's letter and Mr. Foster's commitment when she certified. Tr. 1075. She stated that she was not relying on equipment vendors. Tr. 1076. And she said there had been no discussion about equipment vendor financing at the time she certified. Tr. 1076. Ms. Hatcher relied on Mr. Mims' estimates as being the costs for the station. Tr. 1070. She did not see the bank letter before she certified and knew nothing about its details except for the amount. Tr. 1079, 1080, 1081. In her view, the bank substantiated Mr. Foster's reliability. Tr. 1083. In her mind, she never intended to borrow the money from East Texas State Bank. Tr. 1084. While Ms. Hatcher was familiar with the Form 301 instructions, she admitted that she never asked Mr. Foster for a balance sheet. Tr. 1091. She had no knowledge of Mr. Foster's liabilities, except that he had commitments in the millions of dollars to other broadcast applications. Tr. 1114-15. She believes she substantiated Mr. Foster's liquid assets by being told by Mr. Mims that "everything was okay with the bank." Tr. 1084. She did ask a friend, Arthur Craft, to check out Mr. Foster. Tr. 1085. But Mr. Craft is not a personal friend of Mr. Foster and he does not have personal knowledge of Mr. Foster's financial interests. Jt. Stipulations, received September 19, 1989. She knew that neither Mr. Craft nor Ms. Cobb, her other source of information about Mr. Foster, knew how much money Mr. Foster had. Tr. 1093.

19. Currently CHM also relies on a letter from the National Bank of Washington, which is dated March 22, 1989 and gives assurance of a loan for $350,000. CHM Financial Exh. 4A. Mr. Foster continues to promise to lend the estimated construction and operation costs. Tr. 1039-40, 1084; Texas, Ltd. Exh. 10, at 8.

Kent Foster's Reliability

20. Rita Capobianchi, a former business associate of Kent Foster, testified that when Mr. Foster was asked to provide the money he promised in their business ventures, he would not. Tr. 1272. In November 1985, Ms. Capobianchi and Mr. Foster formed Americell, Inc., which filed 150 MSA cellular applications. Tr. 1256. They owned equal shares. Mr. Foster was obligated to provide all the financing for the construction and operation of the systems. Tr. 1257. Mr. Foster did not show Ms. Capobianchi a balance sheet but he did tell her about his paintings, race horses, and cellular interests. Tr. 1258-59. She decided from his descriptions that he could supply the money. Tr. 1259-60.

21. When Americell was selected by lottery, Mr. Foster said they would rely on equipment vendor financing. Tr. 1261. On two occasions, Mr. Foster refused to provide money he was apparently obligated to provide. Tr. 1266, 1268, 1270. Ms. Capobianchi claims that, because Mr. Foster failed to fulfill his obligations, Americell was forced to sell its authorization instead of constructing and operating the system. Tr. 1272. Ms. Capobianchi also told Mr. Foster that she believed it was in the company's "best interests" to sell out. Tr. 1318.

22. Ms. Capobianchi conceded that Mr. Foster did arrange for financing of company expenses through an equipment vendor, Tr. 1299, 1300, 1306, and he made his required capital contribution. Tr. 1285. He also paid the company's engineering bill. Tr. 1291. Ms. Capobianchi testified that she believed Mr. Foster could personally provide $150 million to fund her successful applications. Tr. 1297.

23. Kent Foster is the 100% owner of Global Land Mobile Satellite which was an applicant for a land mobile satellite system. Tr. 1187. Mr. Foster estimated that the proposed system would cost $442 million to operate. Tr. 1187-88. Each of the applicants was required to show that they had $5 million in cash or the immediate availability of the money; Mr. Foster's company submitted a letter in accordance with the Commission's order, including the required certification. Tr. 1188; Skywave Exh. 22, at 2, ¶ 9. When the Commission required that the money be deposited in an escrow account, Global did not do so. Tr. 1193. Global's application was dismissed. Tr. 1193. Mr. Foster appears to claim that he changed his mind. Tr. 1193.

Issue 3: Comparison of the applicants Full-time participation in station operation by owners

Texas, Ltd.

24. Texas, Ltd. has six owners, four limited partners who own 15% of the partnership, Hubert B. Payne, Darrell A. Fields, Dominic L. Ozanne, Val C. King, and Joseph C. Hewitt, and one general partner, Andre Woodson, who owns 25% of the partnership. Texas, Ltd. Exh. 1. Mr. Woodson has promised to work full time, 40 hours per week, as the proposed station's general manager. Texas, Ltd. Exh. 3, at 1. Mr. Woodson's responsibilities will include overseeing program production; purchasing equipment, services and programming; and developing station news and editorial policies. *Id.* He will also hire and supervise all station management personnel and will be responsible for the administration and implementation of the station's EEO program. *Id.*, at 1-2.

25. Mr. Woodson is an African American. Texas, Ltd. Exh. 3, at 2. He is not a local resident but he will move to Beaumont. Texas, Ltd. Exh. 5, at 3. Mr. Woodson has worked at broadcast stations since October 1973. Texas, Ltd. Exh. 3, at 1-2. From 1973 to May 1977, he worked part-time at two stations. *Id.* Since August 1977, he has worked full time at two television stations. *Id.*, at 2. He currently is national sales manager at WDAF-TV, Dallas, Texas. *Id.*, at 2.

26. Mr. Woodson was contacted by Hubert Payne about filing a broadcast application. Tr. 104-05. Mr. Payne told him about where allocations were available. Tr. 105, 164-65. Mr. Payne also told Mr. Woodson that he would arrange for the other partners. Tr. 119. Mr. Woodson and Mr. Payne agreed that Mr. Woodson would be the general partner and the limited partners would provide the necessary capital. Tr. 107. Mr. Woodson agreed to Mr. Payne's selection of limited partners. Tr. 120. Prior to agreeing to form the partnership, Mr. Woodson met only Mr. Payne and Val King. Tr. 119. After he decided to enter into a partnership agreement, Mr. Woodson did discuss with Mr. Payne the background of the three other limited partners. Tr. 127-28. Mr. Woodson met Mr. Payne and Mr. King at a trade seminar two years before filing the application. Tr. 119. When he was approached about the application, it was done by telephone. He did not meet with any of the limited partners while the application was being prepared. *Id.*

27. Mr. Woodson claims he hired the applicant's law firm and engineer and reviewed the engineering in the application but he could not recall details about hiring the applicant's law firm, Tr. 108-09, speaking to engineers, Tr. 94, or reviewing engineering to the application. Tr. 95-96. Sachs-Freeman, Texas, Ltd.'s engineering firm, began preparing the engineering before Mr. Woodson became involved and obtained the antenna site before it was hired. Tr. 153-55. While the Texas, Ltd. partnership agreement precludes the limited partners from being involved in media activities of the partnership, the limited partners, in a series of telephone conference calls, participated in deciding where and how to obtain a financial commitment letter. The letter itself was obtained by Dominic Ozanne, one of the limited partners. Tr. 143-44. The limited partnership agreement was one the limited partners used in other proceedings. Tr. 114. The limited partners also selected the applicant's law firm. Tr. 101-02, 109-10. The firm was not hired until the week the application was filed. Tr. 108-09. Texas, Ltd.'s law firm recommended the applicant's engineer and informed Mr. Woodson about the bills that needed to be paid. Tr. 87, 91-92, 93. Mr. Woodson said that the partnership agreement provides that he direct the partnership and the limited partners will supply the capital. Tr. 126. He stated that the partnership agreement bound the limited partners to finance the application and the construction and operation of the station. Tr. 129-30. The partnership agreement, however, provides that the limited partners are obligated only for their capital contributions, $750.00 each, and additional contributions are made only if they consent to do so. Texas, Ltd. Exh. 6, at 3, 19. Nevertheless, the limited partners determined how the financing will be

accomplished. Tr. 145. Mr. Woodson relied on the limited partners' track record of raising capital for other ventures. Tr. 131.

Skywave

28. Skywave has one voting stockholder, Alice Felix Ramsey, who owns 100% of the voting stock and 25% of the equity. Skywave Exh. 1. She is the president, secretary, treasurer and a director of the corporation. *Id.* Daniel E. Ramsey is the only other officer; he is a director and assistant secretary and assistant treasurer. *Id.* Skywave Communications Corporation owns all nonvoting stock and 75% of the equity. *Id.*

29. Alice Ramsey proposes to work full time, 40 hours per week, at the station as the general manager. Skywave Exh. 2, at 4. She will be responsible for the day-to-day supervision of all aspects of the management of the station. *Id.* Ms. Ramsey is African American, female, and has lived in Beaumont for forty years. Skywave Exh. 2, at 1, 4. Ms. Ramsey has been active in local civic activities. From 1969 to 1987, she was a member of the Citizens Action Committee, an organization to further equality for African Americans in Beaumont. *Id.* at 1. She also worked with the Black Adoption Council (1984), the Southeast Texas Sickle-Cell Anemia Foundation (Board of Directors, 1985-86) and the NAACP (1980 to present). In 1987 Ms. Ramsey received an award for her work with the NAACP. In 1978, Ms. Ramsey helped found the Opportunities Industrialization Center of the Southeast, Inc., an organization that assists high school dropouts and unemployed persons over the age of fifty in obtaining skills necessary to successfully enter the workforce. *Id.*, at 2. She is also a member of the Beaumont Chapter of Top Ladies of Distinction, Inc. She has been an officer and board member of both the Industrialization Center and Top Ladies of Distinction. She has belonged to a number of other local civic organizations including the Governor's Education Council. *Id.*, at 3.

30. Ms. Ramsey began working in broadcasting in 1972 when she worked as an announcer and sales representative at KLVI/KPBO (AM-FM) and from 1973 to 1978 she was a news reporter and part-time anchor person for a local television station KBMT(TV). From 1984 to the present, Ms. Ramsey has produced and been the host of "Interaction," a local public affairs program broadcast by KBMT. *Id.*, at 4.

31. Ms. Ramsey was approached by Leon Perkinson, the president, director and single largest shareholder of SCC. Thomas Jones, who was a partner in McFadden, Evans & Sill, the communications law firm that represents Mr. Perkinson in his communications interests, introduced Leon Perkinson to Ms. Ramsey. Tr. 178, 480; Skywave Exh. 5, at 1. While Mr. Perkinson and Ms. Ramsey agreed that she would have 100% of the voting control, Ms. Ramsey said there was no particular reason for her having all the voting control. Tr. 190-91. Mr. Perkinson gave Ms. Ramsey a list of questions that would be asked of her during the hearing and told her that her participation would forward Commission policy objectives. CHM Exh. 11, at 1; Tr. 451-52. He also supplied Ms. Ramsey with information about construction costs and operating expenses. CHM Exh. 11, at 1; Tr. 235. Mr. Perkinson told Ms. Ramsey that she would be expected to know about such matters in order to pursue the application. CHM Exh. 11, at 1. He offered to provide whatever help she requested. CHM Exh. 11, at 1; Tr. 457.

32. Mr. Perkinson suggested, and Ms. Ramsey agreed, that Skywave be incorporated in Indiana where he lived and to hire Phillip Kappes, an Indiana corporate attorney who had been Mr. Perkinson's lawyer for 25 years. Tr. 318, 319, 446. Mr. Kappes is corporate attorney for several of SCC's applications. Tr. 446-47. Mr. Perkinson also selected McFadden, Evans & Sill, the firm that represents all other SCC applications. Tr. 265, 480. Ms. Ramsey did not meet with the firm prior to retaining it. Tr. 244. Her local attorney contacted the firm. Tr. 243. Douglas McFadden, a partner in Skywave's law firm, is a 3% owner of SCC; he has owned as much as 5% of SCC. Tr. 476. Mr. Kappes, who owns approximately 10% of SCC's stock, is the third or fourth largest shareholder of SCC. Tr. 449. McFadden, Evans & Sill and Mr. Kappes have provided legal services to Skywave throughout the application process. Tr. 243.

33. Mr. Perkinson chose Skywave's engineering firm, Communications Engineering Services. Tr. 265. CES was hired by SCC to perform an assessment of the Beaumont market before Mr. Perkinson met with Ms. Ramsey. Tr. 460-61. CES has performed similar services for SCC in other markets. Tr. 480. Mr. Perkinson also recommended Skywave's resident agent in Indiana, contacted a bank for financing, guaranteed loans to Skywave and introduced Ms. Ramsey to a bank in Indianapolis. Tr. 303, 305, 306. He has paid some bills for the applicant directly. Tr. 196, 471; CHM Exh. 14. Mr. Perkinson has the right to stop financing the venture. Tr. 310-11. SCC has the option to require Skywave to purchase its preferred stock at fair market value or convert the shares to common or voting stock on May 1, 1993. Texas, Ltd. Exh. 8, at 2-3; Skywave Exh. 5, at 3; Tr. 185, 189, 329. That provision was suggested by Mr. Perkinson (Tr. 187) and provided in the articles of incorporation which were given to Ms. Ramsey by Phillip Kappes. Tr. 271. Ms. Ramsey accepted the provision without making any change. Tr. 188. Ms. Ramsey owns one share of voting stock and SCC owns three shares of nonvoting stock. If the stock is converted, SCC would have three votes and Ms. Ramsey one. Tr. 189, 330. The articles also reserve to Ms. Ramsey and SCC preemptive rights to purchase stock to maintain their percentage of ownership when new stock is issued. Texas, Ltd. Exh. 8, at 3; Tr. 338.

34. The principal office of Skywave is listed in its articles as being in Indianapolis (Texas, Ltd. Exh. 8, at 1; Tr. 327-28) but Ms. Ramsey said she believes it is in her home in Beaumont. Tr. 327-28. Any shareholder may amend, alter or repeal the bylaws. Texas, Ltd. Exh. 8, at 5; Tr. 330. On April 17, 1989, Skywave amended its application to change the number of shares Ms. Ramsey owned from 400 to 1. Ms. Ramsey said that this change did not alter her equity percentage. Tr. 332. She explained, "I understand the 400 shares to mean the one share, its one in three, okay, and if you take 1,000, 400 is 25 percent and the 600 is preferred shares, that's how I understand it to mean. I could be all wrong." Tr. 333.

35. Ms. Ramsey's spouse, Daniel, is a director, vice president, assistant secretary and assistant treasurer of Skywave. Tr. 198-99, 204, 208, 210. Skywave has reported his interests to Indiana and Texas. Tr. 198-99, 201. Ms. Ramsey, when questioned, first denied and then conceded her spouse's interest. Tr. 299, 304. Mr. Ramsey's interest

was not included in Skywave's direct testimony where the corporation's owners, officers, and directors were listed. Skywave Exh. 1; Tr. 199. Mr. Ramsey has performed the duties of an officer and he believes he is an officer. Tr. 199, 370, 376. While Ms. Ramsey stated in interrogatories that she had paid all bills and signed all checks, Tr. 404, Mr. Ramsey signed at least two checks in his capacity as assistant treasurer. Tr. 197-98, 223, 412. Mr. Ramsey also acted as secretary at Skywave's organizational meeting. Tr. 202. Mr. Ramsey, on his own initiative, found and arranged for Skywave's transmitter site. Tr. 377, 381-82, 408, 412. He also met with local officials about the site. Tr. 405. He participated in discussions with banks about loans for Skywave. Tr. 303, 385-87, 410-11. He helped prepare and review the application. Tr. 391. And he discussed the application with Ms. Ramsey. Tr. 391-92, 410.

36. Skywave's bylaws do not give exclusive control of the corporation to its directors. CHM Exh. 10, at 3. Ms. Ramsey views her spouse's official function as being one where he fills in when she cannot do the job. Tr. 204. Mr. Ramsey attends board meetings, votes on motions, ratifies corporate actions, reviews minutes, and he has signed consent minutes, which authorized the borrowing of money by Skywave. CHM Exhs. 7, 8, & 12; Tr. 221, 398, 399-400, 402-03, 411-12. Ms. Ramsey agreed that Skywave would always have two officers and directors even though Indiana law only requires one. Tr. 230. She selected her spouse because he is the person she most trusted. Tr. 298. Directors have equal power in Skywave's by-laws. CHM Exh. 10; Tr. 231, 232.

37. Originally, Ms. Ramsey intended to share the voting stock with a business associate, Karen Rogers, but Ms. Rogers decided against joining the applicant because she was unwilling to participate in obtaining the station. Tr. 181. Mr. Ramsey has performed those tasks which Ms. Ramsey expected Ms. Rogers to do. Tr. 230-31. Mr. Ramsey associates Skywave interests with himself and Ms. Ramsey also acts as if he has an interest. Tr. 404-05, 309-10. The Ramseys have worked at separate occupations and at times jointly. Tr. 416-17, 418. Mr. Ramsey is aware that Texas is a community property state. Tr. 376.

CHM

38. CHM is a Delaware limited partnership with three general partners, Beverly Hatcher, Amelie Cobb, and Joseph Mims, each of whom owns a 15% interest, and one limited partner, Kent S. Foster, who owns a 55% interest. Texas, Ltd. Exh. 10, at 4. Beverly Hatcher proposes to work full time, 40 hours per week, as the operations manager. CHM Exh. 3, at 1. She will oversee the station's daily programming, including news and information, entertainment, special affairs and advertising. *Id.* She will be coordinator of the programming and sales operations, supervise on-air staff, coordinate public affairs programming and develop and implement the station's EEO policy. CHM Exh. 3, at 1-2.

39. Ms. Hatcher is an African American woman. CHM Exh. 2, at 1. She has lived in Beaumont since 1984 and been involved in community activities. CHM Exh. 2, at 1; CHM Exh. 4, at 1-4. Her activities have included The Southeast Texas Region PTA, Beaumont Heritage Society, Beaumont Camp Fire Council, League of Women Voters, Sisters of Charity Health Care Clinic, Lamar University Mid-Management Advisory Committee. CHM Exh. 4. She has been an officer or board member of some of these organizations. *Id.*

40. Currently, Ms. Hatcher is also considering the purchase of a small chemical company in Nederland, Texas. Tr. 682-83. She plans on operating and developing the business herself with one part-time employee. Tr. 684. If she receives a grant of this license, she would put a manager in charge of the chemical company. Tr. 686. Her civic activities will also continue. Tr. 688-90.

41. Amelie Cobb proposes to work full time, 40 hours per week, as the station's business manager and finance officer. CHM Exh. 3, at 1-2. She would oversee the business affairs of the station, which will include equipment acquisition, payroll, advertising revenues, and expenses. CHM Exh. 3, at 2. Ms. Cobb is female and she has, with the exception of 1964-65, resided in Beaumont since 1961. CHM Exh. 2, at 2. She has been active in community affairs. These have included the Beaumont Housing Authority, Board of Directors of the Art Museum of Southeast Texas, the Junior League, Women's Symphony League, and Schlesinger Nursing Center. CHM Exh. 4, at 4-6. She is a regent of Lamar University and active in politics. *Id.* During the period 1962 to 1964, Ms. Cobb worked as a receptionist and continuity director at KFDM-TV and, from 1964 to June 1965, she worked at KTRH-AM as business manager and executive secretary to the general manager. CHM Exh. 5, at 4. Her position as a regent at Lamar University occupies 18-20 hours per month and she intends to continue that job in addition to working at the station. Tr. 727.

42. Joseph Mims proposes to work full time, 40 hours per week, as the general manager of the station. CHM Exh. 3, at 1. He will oversee the day-to-day operation of station operations. CHM Exh. 3, at 3. Mr. Mims is an African American and he has lived in Beaumont since 1975. CHM Exh. 2, at 2. Mr. Mims belonged to the Beaumont chapter of NAACP from 1981 to 1987. CHM Exh. 4, at 7. From 1971 to 1987, Mr. Mims worked at broadcast stations in on-air and management positions. CHM Exh. 5, at 1.

43. Although Mr. Mims is a broadcast consultant who provides the names of consulting engineers and lawyers to his clients, he did not suggest any engineers to CHM. Tr. 750, 755-56. He claims he did suggest one law firm but it was not a serious suggestion because it was one that he believed would not have done a satisfactory job. Tr. 756. Mr. Mims did not initiate the CHM proposal. The limited partner, Kent Foster, approached Amelie Cobb, the spouse of his longtime friend, in late May 1987. Tr. 712. They had discussed the possibility even earlier. Tr. 708. Mr. Foster told Ms. Cobb that there would be an advantage to having minority partners and she then contacted Mr. Mims and Ms. Hatcher. Tr. 713, 714-15. Even before he contacted Ms. Cobb, Mr. Foster retained an engineering firm and directed them to prepare engineering for the proposal. Tr. 718-19.

44. Ms. Cobb contacted Ms. Hatcher in June 1987 and it was during that month that the partners made an oral agreement. Tr. 531. That agreement became a written Memorandum of Agreement, which the parties signed on July 7, 1987. Tr. 531; Texas Ltd. Exh. 9. No official partnership documents were filed until two years later, shortly before the hearing. Tr. 544. Under the Memorandum of Agreement, Mr. Foster has an investor interest and financing rights. Texas, Ltd. Exh. 9, at 1-2. The

agreement also obligates Mr. Foster to lend the partnership $150,000. Texas, Ltd. Exh. 9, at 2. The partnership agreement requires him to lend $350,000. Texas, Ltd. Exh. 10, at 5. The partnership's Memorandum of Agreement was intended to govern the partnership until a partnership agreement was drafted; the partnership agreement was intended to reflect the Memorandum of Agreement. Texas, Ltd. Exh. 9, at 3; Tr. 669-70. It appears that Mr. Foster also decided that the partnership agreement should be registered in Delaware since none of the general partners made that decision. Tr. 671, 732. CHM represents that Mr. Foster is a passive investor in all broadcast applications in which he has an interest but, in fact, that was not the case in his proposal for Albuquerque, New Mexico. Tr. 618, 623.

45. Pursuant to their Memorandum of Agreement, the partners were to have paid their capital shares by July 10, 1987 when the application was filed but Ms. Hatcher did not complete her contribution until December 1988, Ms. Cobb did not pay her share until November 1988, and Mr. Mims paid his share when he bought his ticket to attend the May hearing. Texas, Ltd. Exh. 9, at 1-2; Tr. 530, 723. The actual partnership agreement was written in February 1989.

Ownership of the Media of Mass Communications

46. Texas, Ltd. has no media interests but Hubert Payne owns 12% of Channel 19, Inc., which holds the license for WOIO-TV, Shaker Heights, Ohio. Texas, Ltd. Exh. 2. Skywave and its owners have no media interests. Skywave Exh. 3. CHM and its partners have no media interests. CHM Exh. 6.

CONCLUSIONS

Issue 1: Whether the applicants' tower proposals will cause a hazard to air navigation.

47. CHM and Skywave's tower proposals exceed 500 feet above ground level. Although the FAA has indicated that that tower height violates part 77 of its rules, it has concluded that CHM and Skywave's tower will not present a hazard to air navigation because their tower locations are beyond airspace normally required for air traffic pattern operation. Initially a no hazard determination was issued by the FAA to Skywave and then, apparently during the hearing last May, the FAA withdrew its approval and issued a hazard determination. It also issued a hazard determination to CHM about the same time. It is the FAA's view that CHM and Skywave's proposals would cause "serious frequency intermodulation interference." The interference from 109.5 MHz, the proposed frequency, in combination with existing stations KKMY on 104.5 MHz and KAYD on 97.5 MHz results in interference from 109.5 MHz to the precision instrument landing system frequency serving Jefferson County Airport Runway 13. It is the FAA's view that operation on the proposed frequency would interfere with the frequency used in preparation for aircraft landings. In 1987, over 1600 aircraft used this navigational system employing 109.5 MHz. The FAA pointed out that both KAYD and KKMY have had proposals to move their towers approved by the FAA. If they move, the interference problem will be resolved.

48. At the outset of the proceeding, Mass Media Bureau counsel, Paulette Laden, believed that the Bureau and the FAA could resolve the frequency intermodulation problem. That has not occurred. Nevertheless, the Bureau indicated, on May 17, 1989, that CHM and Skywave's applications could be granted despite the hazard to air navigation by requiring that, after notification from the Commission that harmful interference is being caused, they reduce power to a point of no interference, cease operation, or take immediate steps to eliminate the interference. The FAA was notified of the Bureau's position and has not commented; it has not opposed the condition. Therefore, CHM and Skywave's proposals, will be conditioned as the Bureau requested.

49. Written testimony on this issue was exchanged on April 17, 1989, and two days later, on April 19, 1989, Texas, Ltd. moved to amend to designate a new site. Texas, Ltd. has been unable to demonstrate good cause for its amendment and its request was denied. *Memorandum Opinion and Order*, FCC 89M-1985, released July 28, 1989. The hearing record establishes that Texas, Ltd. was dilatory in resolving the air hazard problem and that the FAA has found its current site a hazard to air navigation. In addition, Texas, Ltd. has not found a new site that is hazard free. Accordingly, Texas, Ltd. has not demonstrated that it is technically qualified; its application will be denied.

Issue 2: Whether CHM misrepresented that it was financially qualified and whether CHM is financially qualified now.

50. CHM originally estimated that it would need $335,000 to construct the proposed station and $49,062 per month to operate. The total amount needed, excluding prosecution of the application, was estimated at $482,000. These estimates were prepared by Joseph Mims, who is a general partner, former broadcast station manager, and broadcast consultant to groups applying for licenses.[1] CHM certified that it had reasonable assurance from the East Texas State Bank that it would provide a loan for $350,000. In addition, Kent Foster, CHM's only limited partner, promised to lend CHM money to construct and operate. In a Memorandum of Agreement with the general partners, which was agreed to at the time the application was filed, Mr. Foster promised to lend $150,000 to the applicant. Although, when Mr. Foster was asked at the hearing about how much money he would provide, he said he did not know.

51. When a partnership agreement was written in 1989, Mr. Foster became obligated to lend CHM $350,000. Mr. Mims testified that he intended that CHM would use equipment vendor financing, but there is no documentation of that intent. Moreover, Ms. Hatcher, who certified the applicant's financial qualifications to the Commission, said that she did not intend to use equipment financing. While CHM's claim of equipment vendor financing cannot be credited, its certification would still have been warranted if the bank letter expresses reasonable assurance and Mr. Foster could provide the loan he promised.

52. Skywave and Texas, Ltd. challenge whether the letter from East Texas State Bank could legitimately have been relied on by Ms. Hatcher because she had not seen the bank letter when she certified and because the bank expressed only an intent to consider the loan. Although Ms. Hatcher had not seen the letter, she was assured by

two of the partners who secured the letter -- Joseph Mims, who estimated the costs and went to the bank to obtain the letter, and Kent Foster, who also had gone to the bank to request the letter and personally guaranteed the loan -- that the bank would provide reasonable assurance of a loan for $350,000. In fact, the bank did provide the letter and the record demonstrates that the bank intended to give reasonable assurance. The East Texas State Bank letter does state that the bank will "consider" the loan as Skywave and Texas, Ltd. argue but it also provides that it is the bank's "intention and desire" to make the loan on the terms provided in the letter.

53. The bank's board chairman, Raymond Crouch, met with Mr. Mims and Mr. Foster before the letter was issued. At that meeting, Mr. Mims provided an analysis of the proposal which included its cost and the likelihood that it would be financially viable; Mr. Crouch reviewed a financial statement and credit report on Mr. Foster, who was going to guarantee the loan, a financial statement from Amelie Cobb and her spouse, and considered the fact that Mr. Mims was an experienced broadcaster. He then discussed the request with the bank's board of directors and the bank's lawyer before the letter was issued. These facts do not show that the bank was merely accommodating Mr. Foster, who voted 82% of the bank's stock, or that the bank was insincere when it claimed that it intended and wanted to make the loan. The bank's intentions were made known before the partners met to finalize their plans and it was done before Ms. Hatcher certified. The letter from the East Texas State Bank will be credited.

54. Ms. Hatcher also needed to rely on Mr. Foster's promise to lend $150,000, since $350,000 will not be enough to build and operate the station. There is no claim made that she or anyone else in the partnership undertook the necessary analysis of Mr. Foster's liquid assets and short term and long term liabilities. She did rely on impressions that various people had about Mr. Foster's wealth but those impressions were not based on any specific knowledge of Mr. Foster's balance sheet. While she did talk with Mr. Foster about his investments and assets, that discussion was very general.

55. Nevertheless, it appears that her belief about his ability to provide money was warranted. Mr. Foster's July 1987 balance sheet shows liabilities of $301,184 in a note payable to the East Texas State Bank and, in addition, at the time Ms. Hatcher certified, Mr. Foster was obligated to provide $1 million for other broadcast proposals. CHM Financial Exh. 4E. Mr. Foster had liquid assets of about $550,000. He also had assets which were not liquid, which, if he sold them within 30 days, would be worth $1,225,000. Thus, without considering Mr. Foster's obligation to CHM, he had existing obligations of $1,300,000 and liquid assets of $550,000. If his promise to liquidate $1,225,000 in real estate was possible on short notice, he would have had enough to meet all his obligations. The appraisal of the land relied on by Mr. Foster discounts its value because it is to be sold within 30 days; it is the discounted amount on which Mr. Foster relies. As CHM points out, that is sufficient to show the money can be raised. *Citing, International Broadcasting Co.*, 3 F.C.C.2d 449, 451 (1966).

56. The Commission, in *Susan S. Mulkey*, 4 FCC Rcd 5520, 5522 (1989) explained that "uncorroborated oral assurances are not sufficient to resolve all questions concerning the validity of the financial certification." The person proposing to lend the funds must show that he had the necessary financial resources at the time. *Id.* There must be a balance sheet or other documentary evidence demonstrating sufficient net liquid assets to meet his financial commitment. *Id., quoting, Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989). When Ms. Hatcher certified, she did not have any documentary proof on which to base her decision. While Mr. Foster has significant assets, he did not have sufficient liquid assets to meet all of his obligations in each of the Commission proceedings he was already obligated to do so and he never presented a plan to Ms. Hatcher about how he intended to meet his obligation. CHM partners urge that Mr. Foster made an oral promise to meet all the applicant's financial needs. But Mr. Foster's written promise in the Memorandum of Agreement was not that expansive; he agreed to provide only $150,000. The partnership was to be capitalized at $25,000 and the partnership, when officially organized, was to reflect terms and conditions set forth in a Memorandum of Agreement, which was prepared in June 1987.

57. In November 1988, the East Texas State Bank was insolvent and its business was assumed by the First Bank of Buna. While CHM states that it assumed that the bank letter from East Texas State Bank would be honored by the First Bank of Buna, none of the partners did anything to determine whether it would. Marshall Duff, Chief Executive Officer of the First Bank of Buna, stated in a sworn affidavit when this issue was designated that "the First Bank of Buna, N.A., did not assume any unfunded commitments, letters or lines of credit." Furthermore, he said that the First Bank of Buna "would not be interested in extending any commitment, letter or line of credit to Kent [Foster] or to any business entity with which he was affiliated." Motion to Supplement Petition to Enlarge Issues, filed July 5, 1989 by Beaumont Skywave, Inc., Affidavit, at 2. After CHM knew that the East Texas State Bank was insolvent, it was incumbent on CHM to show that it had reasonable assurance for financing its proposal. It did not document that it was financially qualified after the bank failed.

58. Mr. Foster, in November 1988, owned about $1.5 million in liquid assets. CHM Financial Exh. 4C. He also had liabilities of $630,000 listed on his balance sheet and had promised to provide $1.5 million to communications proposals. *Id.* Again, assuming Mr. Foster could liquidate his real estate on short notice, he could meet his obligations. Mr. Foster, in March 1989, obtained a bank letter from the National Bank of Washington for $350,000. In March 1989, Mr. Foster's liquid assets were about the same as in November 1988 and the liabilities listed on his balance sheet were $840,000. CHM Financial Exh. 4D. He also was obligated to provide $3.1 million to broadcast applications. Mr. Foster claims he could liquidate his real estate within 30 days to meet his obligations of over $ 4 million. The Texas real estate is estimated to be worth $1,225,000 within 30 days. Mr. Foster also lists property in the Grand Cayman Islands, British West Indies that appraisers claim is worth about $5.5 million at a forced sale. CHM Financial Exh. 5, at 3. There is a claim of approximately $2 million against the properties. *Id.* It appears that Mr. Foster has available sufficient funds to provide the money he has promised to CHM. He could realize in cash about $1.5 million and

from real estate $6.7 million, which makes available $8.2 million. His liabilities are substantially less than $8 million.

59. On January 22, 1990, Skywave petitioned to reopen the record because Mr. Foster now has additional financial obligations of $350,000. Section 1.65 requires that CHM inform the Commission whenever there is a change in the accuracy and completeness of information furnished in a Commission proceeding. CHM failed to make the required report. Nevertheless, the addition of $350,000 in obligations does not make CHM's reliance on Mr. Foster unreasonable.[2] There is no question that CHM is financially qualified.

60. The question of CHM's credibility on this issue is a close one. It appears that the general partners' impressions of Mr. Foster's ability to finance the applicant was accurate even if not documented. Nevertheless, although Ms. Hatcher certified the financial condition of the applicant, she knew very little about whether CHM would be able to finance its proposal. She never asked specific questions about Mr. Foster's assets and liabilities and she never documented the applicant's ability to finance the proposal. At the same time, Ms. Hatcher testified that she knew the Commission's requirements and she had available experienced counsel. Moreover, Mr. Foster and Mr. Mims, who undertook establishment of the applicant's financial qualifications, were aware of the Commission's requirements. Mr. Foster is a veteran of Commission proceedings and Mr. Mims earns his living explaining to potential applicants how to obtain grants from the Commission. All of this argues against the Commission's being able to rely on CHM's representations. If there were other instances where CHM was unreliable, it would be disqualified. However, because CHM's certification was based partly on a valid bank letter and a timely analysis of the cost of the facility, it is evident that CHM attempted to comply in part. For this reason CHM will not be disqualified.

Issue 3: Determination of which proposal would best serve the public interest

61. CHM and Skywave are the only two applicants that are qualified and entitled to comparison. Both applicants claim that all of their controlling owners will manage the station on a full-time basis and will determine the policy governing the applicant. Skywave is a corporation with one voting stockholder, Alice Felix Ramsey. Ms. Ramsey owns 25% of Skywave's equity and Skywave Communications Corporation owns the remaining 75%. Ms. Ramsey represents that she will be the general manager of the station and that she will work full time, 40 hours per week. Ms. Ramsey is also a corporate director and holds the offices of president, secretary, and treasurer of Skywave.

62. If the past is prelude to the future, however, it is apparent that Ms. Ramsey will not exercise complete control over Skywave and its communications business. Skywave Communications Corporation (SCC) initiated the proposal. Leon Perkinson, the president, director, and single largest shareholder in SCC approached Ms. Ramsey about managing the station. The record reflects that SCC initiated Skywave's proposal before Ms. Ramsey became a participant. SCC selected the legal and engineering assistance for the applicant, arranged for financing, and determined the nature of the governing documents. In all important respects, SCC organized the applicant and determined Skywave's proposal for the license.

63. While Ms. Ramsey assisted in arranging for an antenna site, the actual location and details of securing the site were undertaken by her spouse, Daniel Ramsey. Mr. Ramsey is vice president, assistant secretary and treasurer and a director of Skywave. The corporate records reflect that Mr. Ramsey has participated in the decisions that have been made for the corporation in his role as a director. He has also exercised authority as an officer when Ms. Ramsey was unable to do so.

64. Two of the stockholders of SCC, in addition to Mr. Perkinson, have provided services to Skywave. Phillip Kappes, who is the third or fourth largest stockholder of SCC, has been Skywave's corporate lawyer and provided its corporate documents. Douglas McFadden, who is also a stockholder of SCC, has provided legal services for Skywave through his law firm, McFadden, Evans & Sill. Mr. McFadden's firm completed the application for the applicant and has represented it before the Commission. In addition, on May 1, 1993, SCC has the right to require Skywave to purchase its preferred stock or issue voting stock to SCC in proportion to its equity. SCC made this provision to protect its investment. In order to further protect its investment, SCC's Leon Perkinson wrote to Ms. Ramsey and told her what facts she would need to know in order to appear at the hearing and answer discovery requests. Ms. Ramsey's answers to interrogatories attempted to convey her participation but, when her claims were examined in detail, it turned out she represented a role substantially greater than she had. For example, Ms. Ramsey claimed that she paid all bills and signed all checks. Actually, her spouse and Mr. Perkinson also paid bills and her spouse signed checks. As is evident, Skywave is not a corporation where the nonvoting preferred shareholders have been passive. In fact, it is the voting stockholder who has stood by while SCC made all significant decisions. These facts rebut Skywave's claim that SCC is passive.

65. CHM argues that Ms. Ramsey should be denied any credit because of her largely passive role in creating the applicant and preparing the proposal. That might be the case if only Skywave's past performance were analyzed but Ms. Ramsey has some broadcast experience and she lives in the community. It is not implausible that she will be active at the station, although it is apparent that she will not act independently of SCC or her spouse, both of whom she regularly has relied on. In some respect, it is to be expected that the entity putting up the money would initiate the proposal. As CHM points out, SCC has frequently applied for station licenses and is experienced in initiating broadcast license applications. Some of its owners earn their living providing legal advice to applicants. If it were assumed that Ms. Ramsey's equity share of 25% represents her control (which would be the maximum amount that could be credited), Skywave will not prevail against CHM.

66. CHM is a limited partnership with four partners. Three of the partners, Amelie Cobb, Joseph Mims, and Beverly Hatcher, each have a 15% equity interest. They have been designated general partners and have promised to manage the station on a full-time, 40 hours per week, basis. There is one limited partner, Kent Foster, who owns 55% of CHM's equity. The limited partner in CHM, like the nonvoting stockholder SCC in Skywave, also

initiated the proposal. The law firm that represents CHM and the engineering firm that prepared the engineering were selected by Mr. Foster. Mr. Foster has been in charge of providing the applicant's financing and directly or indirectly he determined who the general partners would be. He approached the spouse of a friend, Amelie Cobb, and she in turn identified the other two partners.

67. The financial issue which considered whether CHM is financially qualified best illustrates Mr. Foster's control. Beverly Hatcher certified to the Commission that the applicant was financially qualified. But the record reflects that she did what she was told; she made no independent determination of the applicant's financial plan. In fact, when Mr. Foster, in general terms, told the three other partners how wealthy he was, not a single general partner asked him to document his claims. They did not require him to justify his representations, even though they knew they should have. Mr. Mims was fully aware of the Commission's financial requirements and Ms. Hatcher was also. There is no evidence that the general partners have ever exercised any authority or control over Mr. Foster; they have taken his word at face value when it was not in their interest to do so and when they had no specific information to justify such faith. (Of course, CHM could have avoided the whole financial question if Mr. Foster had certified the application since he presumably knew his own net worth.)

68. None of the general partners have ever applied for a Commission license before but Mr. Foster has routinely been an applicant. While the record does not indicate that Mims, Cobb and Hatcher will not work at the station, it is likely that Mr. Foster will exercise some control over his investment. Because CHM proposes that 45% of its owners will manage, it is to be preferred over Skywave. The gap between CHM and Skywave's quantitative proposals is greater than 12.5% and, therefore, comparison of the applicant's qualitative proposals need not be made. *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 (1989).

69. Neither Skywave nor CHM have existing media interests or associations. Because CHM is to be preferred for its quantitative integration of management and ownership, it will receive the grant.

ACCORDINGLY, IT IS ORDERED that the petition for leave to amend, filed August 24, 1989 by CHM Broadcasting Limited Partnership IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the motion of CHM Broadcasting for leave to supply omitted material and to correct error, filed September 11, 1989 IS GRANTED.

IT IS FURTHER ORDERED that the motion to reopen record, filed October 2, 1989 and petition to reopen the record and receive evidence, filed January 22, 1990 by Beaumont Skywave, Inc. ARE DENIED.

IT IS FURTHER ORDERED that the motion for leave to accept proposed findings and conclusions of CHM Nunc Pro Tunc, filed October 23, 1989 by CHM Broadcasting IS GRANTED.

IT IS FURTHER ORDERED that the motion for leave to amend, filed November 9, 1989 by CHM Broadcasting Limited Partnership IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the applications of Texas Communications Limited Partnership (File No. BPH-870710MJ) and Beaumont Skywave, Inc. (File No. BPH-870710NA) ARE DENIED and the application of CHM Broadcasting (File No. BPH-870710NC) for a construction permit for a new FM station on Channel 273C2 in Beaumont, Texas IS GRANTED subject to the following condition:

> Upon receipt or notification from the Commission that harmful interference is being caused by the operation of the licensee's (permittee's) transmitter, the licensee (permittee) shall either immediately reduce the power to the point of no interference, cease operation, or take such immediate corrective action as is necessary to eliminate the harmful interference. This condition expires after one year of interference-free operation.[3]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] Amelie Cobb at one point said she believed the applicant would need only $350,000 but she offered no documentation that that was her view at the time of certification nor did she explain how she arrived at that amount. In light of the letter from the East Texas State Bank for that amount, it appears to be only a post hoc rationalization.

[2] Skywave has independently argued that Mr. Foster is unreliable and cannot be counted on to finance his obligation to CHM, no matter what his personal net worth is. There is some evidence that Mr. Foster has sought licenses and then either failed to follow through until the end of the proceeding or that he obtained licenses in lotteries and decided to sell them rather than provide the service applied for. That behavior does not mean he cannot be relied on here. He has signed two documents which obligate him to provide funds and, although undocumented, he claims that he has paid nearly $200,000 to establish CHM's proposal. While the record does not establish what he has paid, it does confirm that he has a legal obligation to provide funds.

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 5, 1990

COMMENTS INVITED ON FLORIDA REGIONAL PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for the Florida Area (Region 9).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, parties are hereby given thirty days from the date of Federal Register publication of this public notice to file comments and fifteen days to reply to any comments filed. (*See* Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket No. 87-112, Region 9 consists of the State of Florida. General Docket No. 87-112, 3 FCC Rcd 2113 (1988).

Comments should be clearly identified as submissions to *General Docket 90-119, Florida - Region 9,* and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Maureen Cesaitis, Private Radio Bureau, (202) 632-6497 or Fred Thomas, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-55

In the Matter of

Amendment of Section 73.202(b),	RM-6593
Table of Allotments,	RM-6715
FM Broadcast Stations.	RM-6760
(Bolingbroke, Unadilla and Warner Robbins, Georgia)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 23, 1990; Released: March 13, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 2175 (1989), proposing to allot Channel 273A to Warner Robbins, Georgia, as the community's second local FM service, in response to a petition for rule making filed by Donald W. Earnhart ("Earnhart"). After adoption of the *Notice*, William L. Taylor, Jr. ("Taylor") submitted a petition seeking to allot Channel 273A to Bolingbroke, Georgia, as a first local service. We have treated that request as a counterproposal in this proceeding. Gary Davidson ("Davidson") filed comments and counterproposal seeking to allot Channel 273A to Unadilla, Georgia, as a first local service.[2] Earnhart, Taylor and Radio Mableton Limited ("RML"), an applicant for Channel 273A at Mabelton, Georgia, filed reply comments in response to the counterproposals. RML filed additional late reply comments.[3]

2. The proposals for Channel 273A at Warner Robbins, Bolingbroke and Unadilla, Georgia, conflict with each other because the proposed sites do not meet the minimum distance separation requirements of the Commission's Rules. The proposals are mutually exclusive.

3. Davidson, in his comments and counterproposal, states that Unadilla is a small, isolated community located in Dooly County, Georgia, with a population of close to 1500 people. Davidson states that according to City Hall, Unadilla is an incorporated community. Davidson goes on to state that Unadilla is governed by a Mayor and a six member city council. It has a police department with four full-time officers, two fire stations and a post office, and many other retail stores. Davidson states that Unadilla does not have a local broadcast station licensed to it, but Warner Robbins has an AM and FM service licensed to it and also receives signals from nearby Macon, Georgia.

4. Earnhart, in his reply comments, states that it is highly unlikely that a radio station in the unincorporated "small isolated community" of Unadilla would be economically feasible. Rather than arguing the comparative merits of the respective communities, Earnhart performed a channel search and determined Channel 229A is an additional equivalent channel available for allotment to Warner Robbins.[4]

5. Taylor, in response to the counterproposal, states that Warner Robbins has three full time broadcast services WPPR(FM), Channel 269A, WCOP(AM) and WZQB(AM). Taylor argues that Bolingbroke has no broadcast service and that Channel 273A should be allotted to Bolingbroke as its first full time local service.

6. RML, in response to Taylor's counterproposal, suggests that Channel 271A be allotted to Bolingbroke instead of Channel 273A. RML states that if Channel 271A is allotted to Bolingbroke, and if RML becomes the sole applicant for Channel 273A at Mableton, Georgia, it will be able to avail itself of a 6 kW upgrade as proposed in MM Docket No. 88-375.

7. After consideration of the information filed in this proceeding, we believe that Davidson has provided us with sufficient data to conclude that Unadilla is a community for allotment purposes. Although unincorporated, Unadilla is listed in the 1988 Rand McNally Road Atlas with a population of 1,457 persons. It has a Mayor, a six member city council, a police department, two fire stations, a post office and other retail stores. We find that Unadilla is a community for allotment purposes. We conducted a frequency search which found alternate Channel 278A available for allotment to Unadilla. Because channels are available to satisfy each expression of interest filed in this proceeding, a comparative analysis is unnecessary.

8. As stated in the *Notice*, Channel 273A can be allotted to Warner Robbins in compliance with the Commission's minimum distance separation requirements with a site restriction 3.5 kilometers (2.2 miles) south to avoid a short-spacing to Station WKZR(FM), Channel 272A, Milledgeville, Georgia.[5] Channel 271A can be allotted to Bolingbroke as a first local service in compliance with the Commission's minimum distance separation requirements with a site restriction 10.4 kilometers (6.4 miles) west to avoid a short-spacing to Station WKZR(FM), Channel 272A, Milledgeville, Georgia.[6] Channel 278A can be allotted to Unadilla as a first local service in compliance with the Commission's minimum distance separation requirements with a site restriction 11.9 kilometers (7.4 miles) southeast.[7] Since each of the petitions resulting in these allotments was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 27, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Bolingbroke, Georgia	271A
Unadilla, Georgia	278A
Warner Robbins, Georgia	269A, 273A

10. The window period for filing applications will open on **April 30, 1990,** and close on **May 30, 1990.**

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Bolingbroke and Unadilla, Georgia, has been added to the caption.

[2] Public Notice of the counterproposals for Bolingbroke and Unadilla, Georgia, was given on May 12, 1989, Report 1780.

[3] Taylor's response to RML's comments to its counterproposal constitutes an unauthorized pleading. It will not be accepted.

[4] Channel 229A at Warner Robbins is short-spaced to a proposal to allot Channel 229A to Jeffersonville, Georgia, in MM Docket No. 88-460. The comment period in that proceeding expired on November 21, 1988, and Channel 229A was subsequently allotted to Jeffersonville in that proceeding.

[5] The coordinates for Channel 273A at Warner Robbins are North Latitude 32-35-44 and West Longitude 83-37-00.

[6] The coordinates for Channel 271A at Bolingbroke are North Latitude 32-55-22 and West Longitude 83-54-30.

[7] The coordinates for Channel 278A at Unadilla are North Latitude 32-09-46 and West Longitude 83-41-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-123

In the Matter of

Amendment of Section 73.202(b), RM-7032
Table of Allotments,
FM Broadcast Stations.
(De Ridder, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 23, 1990; Released: March 13, 1990

By the Chief, Allocations Branch:

1. West Central Broadcasting Co., Inc. (petitioner), licensee of Station KROK(FM), Channel 221A, De Ridder, Louisiana, filed before the Commission a petition for rule making seeking the substitution of Channel 221C3 for Channel 221A at De Ridder, and the modification of its station's license to specify operation on the higher class channel. Petitioner states that the power increase would enable it to better serve De Ridder and the surrounding area with expanded FM coverage. Petitioner further states its intention to apply for the channel, if allotted.

2. We believe the proposal warrants consideration. Channel 221C3 can be allotted to De Ridder in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.6 kilometers (9.1 miles) southwest of the city.[1]

3. In an attempt to demonstrate what effect its upgrade would have on non-commercial FM stations operating on Channels 218, 219 and 220, petitioner states that Station KROK(FM)'s present operation on Channel 221A blocks most of the Channel 221C3 precluded area. Furthermore, petitioner claims that a new station on Channel 219C2 at Lake Charles, Louisiana, already precludes the area precluded by Channel 221C3 at De Ridder.

4. Our engineering analysis reveals that the proposal lies within the Grade B (47dBu) contour of Station KFDM(TV), Channel 6, Beaumont, Texas. Therefore, in order to accomplish the upgrade at De Ridder on Channel 221C3, petitioner was required to submit a noncommercial educational impact study with its petition. Although petitioner claims that a new construction permit on Channel "219C2" at Lake Charles, Louisiana, already precludes the area precluded by its proposal, the information is inaccurate. The new construction permit at Lake Charles is for Channel 219A which is less preclusive. Thus, petitioner is requested to furnish a detailed preclusion study in initial comments herein. Petitioner should demonstrate the impact of allotting Channel 221C3 to De Ridder on the availability of Class A, C3, C2, C1 and C noncommercial educational allotments on Channels 218, 219 and 220. The guidelines for the preclusion study[2] are as follows:

(a) The preclusion study should be done on each affected channel for each possible class of noncommercial FM station (that is A, B1 and B in zone I and I-A or A, C3, C2, C1 and C in zone II).

(b) For each class of noncommercial educational FM station, maximum power and antenna height and omnidirectional operation should be assumed.

(c) Preclusion should be considered to occur only if the noncommercial educational FM station would be prevented by the upgrade, and is not already precluded either by the existing Channel 221 station that is the subject of the proposal or by other commercial or noncommercial educational FM stations.

(d) Preclusion should be determined both inside of and outside of the channel 6 Grade B contour. While the existence of the channel 6 station imposes a burden on noncommercial educational FM applicants, determination of the preclusive effect of the channel 6 station can be complicated and may be dependent on the particular transmitter site selected. Therefore, the initial preclusion area determination should be done without considering the channel 6 station's impact. The channel 6 impact can be included at a later stage of the study, if necessary.

(e) Within any identified preclusion area, significant communities, normally those with a population in excess of 1000, should be identified. Existing local noncommercial educational FM stations in the precluded communities should be listed.

(f) Optionally, if precluded communities without local noncommercial educational FM service are found, additional information can be provided, including:

(i) Availability of noncommercial educational FM service from stations licensed to nearby communities;

(ii) Availability of other channels for a noncommercial educational FM station in the precluded community (include consideration of channel 6 station impact); and

(iii) Impact of channel 6 on noncommercial educational FM channel availability in the community. If a precluded community is a reasonable distance beyond the Grade B contour of the channel 6 station, then it is possible that the channel 6 station has no effect on the availability of a particular class of noncommercial educational FM station in that community. The non-commercial educational FM channel that is closest to channel 6 in frequency, and therefore most likely to be affected is channel 201. Preclusion in a community that is beyond the channel 6 impact distance is not significant. The appropriate distance for class C stations is found in Table A of Section 73.525(a)(1) of the Commission's Rules. Lesser distances are appropriate for other classes of noncommercial educational FM stations. For convenience, the distances have been calculated and are as follows:

Class	Distance from Channel 6 station
A	165 kilometers
B1	189 kilometers
B	207 kilometers
C3	189 kilometers
C2	207 kilometers
C1	234 kilometers
C	265 kilometers

Precluded communities within these distances from the channel 6 station generally constitute a negative factor to be weighed against the public interest gains sought through the upgrade.

5. As requested, we shall propose the modification of the license of Station KROK(FM) to specify operation on Channel 221C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstate the availability of an additional equivalent channel at De Ridder.

6. In view of the fact that De Ridder, Louisiana, could receive an expanded FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
De Ridder, Louisiana	221A	221C3

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **May 4, 1990,** and reply comments on or before **May 21, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

James J. Popham, Esq.
Attorney at Law
4410 Greenwich Parkway, N.W.
Washington, D.C. 20007
(Counsel for petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner specified the restricted site at coordinates 30-46-30 and 93-25-00.

[2] The guidelines for the preclusion study are set forth in *Myrtle Beach, South Carolina*, 3 FCC Rcd 7269 (1988). Here, we have incorporated the Class C3 specifications.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-122

In the Matter of

Amendment of Section 73.202(b), RM-7075
Table of Allotments,
FM Broadcast Stations.
(Coeburn, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: February 23, 1990; Released: March 13, 1990

By the Chief, Allocations Branch:

1. At the request of Preston L. Salyer (petitioner), permittee of Station WZQK(FM), Channel 259A, Coeburn, Virginia, the Commission considers herein a petition for rule making seeking the substitution of Channel 259C3 for Channel 259A at Coeburn, and the modification of Station WZQK(FM)'s construction permit to specify operation on the higher class channel. Petitioner states his interest in applying for the channel, if allotted.

2. Channel 259C3 can be allotted to Coeburn in compliance with the Commission's minimum distance separation requirements at the petitioner's proposed site.[1] Therefore, as requested we shall propose to modify the construction permit for Station WZQK(FM) at Coeburn to specify operation on Channel 259C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Coeburn.

3. In view of the fact that Coeburn, Virginia, could receive an expanded wide coverage area FM service, we believe it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Coeburn, Virginia	259A	259C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 4, 1990,** and reply comments on or before **May 21, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

B. Jay Baraff, Esquire
Baraff, Koerner, Olender
& Hochberg, P.C.
2033 M Street, N.W.
Suite 700
Washington, D. C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments. Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The site specified by the petitioner is located 18.1 kilometers (11.2 miles) northwest of Coeburn. The coordinates are 37-02-56 and 82-37-35.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-92

In re Applications of

WARREN D. WELLIVER (hereafter: Welliver)	File No. BPH-880218MC
ASHMO RADIO, INC. (hereafter: AshMo)	File No. BPH-880219MA
SOBOCOMO RADIO, INC. (hereafter: Sobocomo)	File No. BPH-880219MD
THE CLAIR GROUP, A MISSOURI LIMITED PARTNERSHIP (hereafter: Clair)	File No. BPH-880219MF
MULTICOM BROADCASTING, INC. (hereafter: Multicom)	File No. BPH-880219MJ
MELVIN B. CALDWELL (hereafter: Caldwell)	File No. BPH-880219ML
KATHY J. WITHERS (hereafter: Withers)	File No. BPH-880219MN
THOMAS R. KOENIG (hereafter: Koenig)	File No. BPH-880219MO

For Construction Permit for a New FM Station on Channel 291C2, Ashland, Missouri

HEARING DESIGNATION ORDER

Adopted: February 16, 1990; Released: March 13, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *AshMo.* Information before the Commission indicates that AshMo was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Oliver Springs, Tennessee	88-201
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

3. An identical three-fold issue was specified in each of the above proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolve the potentially disqualifying character issue. This unresolved character issue calls into question AshMo's qualification to be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

4. *Multicom.* Pursuant to 47 C.F.R. § 1.65, applicants are required to timely amend their applications so as to keep them substantially complete and accurate. Whenever information furnished in a pending application is no longer substantially complete and accurate in all significant aspects, or whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant is required to amend his application to furnish such information as may be appropriate within 30 days. Staff investigation reveals that Multicom has failed to report: (1) the dismissal of its application for Santa Barbara, California (BPH-880301NG) on October 11, 1989;[1] (2) the return of its application for Victoria, Texas (BPH-880421ME) on February 10, 1989; and (3) the grant of the assignment of KDOK(AM), Tyler, Texas (BAL-890731EA) from Tyler Broadcasting Company, Inc., the principals of which include the principals of Multicom, to Blue Jay Productions, Inc. d/b/a Williams Communications on October 12, 1989.[2] Accordingly, Multicom will be required to file an amendment completely and accurately updating its application with respect to its media interests as required by 47 C.F.R. § 1.65.

5. Multicom proposes to locate its antenna on the existing tower of KMIZ(TV), Columbia, Missouri, without changes to the tower structure that would affect its height. Multicom's applications specifies tower heights (including obstruction lighting) of 351 meters above ground level (AGL) and 597 meters above mean sea level (AMSL) for this structure. However, Commission records indicate that

this tower is 335 meters AGL and 581 AMSL. Because Multicom clearly proposes to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in the application in question, the staff could, "drawing on the application[s] as a whole," confidently verify the actual tower heights by taking official notice of the tower heights as found in the Commission's records for the licensed collocated facility. Accordingly Multicom's application was found to be acceptable for filing. However, Multicom will be required to submit a corrective amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

6. *Withers*. In Section V-B, Item 7(b), Withers lists the height of the antenna radiation center above ground level (C/R-AGL) as 376 meters and the height of the antenna radiation center above mean sea level (C/R-AMSL) as 130 meters. These figures do not match the tower sketch, which lists the C/R-AGL as 130 meters and the C/R-AMSL as 376 meters. Drawing on the application as a whole, and noting that a C/R-AMSL of 130 meters would place the antenna far underground, we can confidently and reliably determine that the two figures in Section V-B, Item 7(b) were transposed. Consequently, the application was found to be acceptable for tender and for filing. However, Withers will be required to amend his application to correct these two radiation center heights within 30 days of the release of this Order.

7. *EEO*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Welliver, AshMo, Caldwell and Koenig have filed such statements, they are deficient. Welliver has not listed a black-oriented organization for recruitment purposes even though U.S. Labor Department statistics list Ashland in an area with a work force that is 5.8% black. It is not clear if AshMo has listed a female-oriented organization for recruitment purposes; the organization called Opti-Mrs is not familiar to the Commission staff. Caldwell and Koenig also have not listed a black-oriented organization. Accordingly, Welliver, Caldwell and Koenig will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.[3]

8. *Late-filed Amendments*. AshMo and Multicom have petitioned for leave to amend their applications on the dates specified below. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
AshMo	November 23,1988; December 12, 1988; December 22, 1988; December 28, 1988; December 29, 1988; January 24, 1989
Multicom	June 22, 1988; August 15, 1989; September 1, 1989
Koenig	July 12, 1988; July 27, 1988

9. *Air Hazard*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and applicants AshMo, Clair and Koenig have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna supporting structure proposed would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of AshMo.

2. To determine whether AshMo's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether AshMo possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine whether there is a reasonable possibility that the tower height and location proposed by AshMo, Clair and Koenig would constitute a hazard to air navigation.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Multicom will be required to submit an amendment completely and accurately updating its application as required by 47 C.F.R. § 1.65 to the presiding Administrative Law Judge.

13. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Multicom shall submit a corrective amendment pursuant to paragraph 5 herein to the presiding Administrative Law Judge.

14. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Withers shall submit a corrective amendment pursuant to paragraph 6 herein to the presiding Administrative Law Judge.

15. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Welliver, AshMo, Caldwell and Koenig shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

16. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by AshMo, Multicom and Koenig ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] In its August 15, 1989 amendment, Multicom did report the filing of its August 14, 1989 request for dismissal of the application.

[2] In its August 15, 1989 amendment, Multicom did report the filing of its July 31, 1989 assignment application.

[3] In the event the organization listed by AshMo satisfies the female EEO recruitment requirement, AshMo may amend its EEO program to describe the organization.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-338

In re Applications of

SALINAS BROADCASTING LIMITED PARTNERSHIP, A California Limited Partnership	File No. BPH-860917MC
ARTICHOKE BROADCASTING CORPORATION	File No. BPH-860917MG
SOUTHERN CALIFORNIA BROADCASTING COMPANY	File No. BPH-860918NO
CRYSTAL COMMUNICATIONS, INC.	File No. BPH-860918NZ
Julio A. Villamil, Maria Elena Villamil, Lawrence M. Wrathall and Nayereh E. Wrathall d/b/a VILLAMIL FM RADIO	File No. BPH-860918OL
CALIFORNIA COMMUNITY TELEVISION NETWORK	File No. BPH-860918OO

For Construction Permit for a New Commercial FM Station at Salinas, California

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 1990; Released: March 12, 1990

By the Review Board: MARINO (Chairman) and BLUMENTHAL.

1. By *Memorandum Opinion and Order*, 4 FCC Rcd 8325 (1989) (*Supplementation Order*), we requested the views of the Mass Media Bureau as to whether this proceeding should be remanded on a site availability issue. Our *Supplementation Order* observed that Villamil had averred that local governmental authorities (the County Planning Department and the County Airport Land Use Commission) firmly opposed, on environmental grounds, the Buena Vista transmitter site proposed by five of our six applicants, including the winner below.

2. More specifically, Villamil asserted that the local Planning Commission relies heavily on the recommendations of the County Planning Department and the Airport Land Use Commission, both of which strongly oppose approval of the Buena Vista site. It also considers the views of the area Citizens Association, which also opposes any such approval. Villamil Exceptions, Exh. B-I. No action by the Planning Commission itself will be taken until the actual site owner officially applies for approval, after the FCC makes a final grant in this proceeding. Nonetheless, the Chairman of the Board of Supervisors, which has appointive and review authority over the Planning Commission, stated in writing that approval of the site was not likely because:

> [T]he Toro Area Master Plan is an adopted ordinance of the County of Monterey and thereby has the force of law within our jurisdiction. *Waiver of mandated policies within the Toro Master Plan is not possible and will not be considered.*
>
> It is also very important that the Monterey County Airport Land Use Commission approve any proposed antenna site, as denial by that commission will preclude any such development.

Id., Exh. G (emphasis added).

3. As we explained in our *Supplementation Order* (at 8326):

> It is long-standing Commission policy that a site availability issue will not be specified based on the lack of advance approval of local governmental authorities, unless a "reasonable showing" is made by a petitioner which demonstrates that such approval is improbable. *Teton Broadcasting Limited Partnership*, 1 FCC Rcd 518, 519 (1986); *San Francisco Wireless Talking Machine Co., Inc.*, 47 RR 2d 889, 893 (1980); *Alden Communications Corp.*, 102 FCC 2d 518, 520 (Rev. Bd. 1985); *Gainesville Media, Inc.*, 59 FCC 2d 382, 385 (Rev. Bd. 1976); *Edward G. Atsinger, III*, 29 FCC 2d 443, 451 (Rev. Bd. 1971); *John Hutton Corp.*, 27 FCC 2d 214, 215 (Rev. Bd. 1971); *El Camino Broadcasting Corp.*, 14 FCC 2d 361, 363 and 12 FCC 2d 329, 330 (Rev. Bd. 1968).

4. Because the Commission's Mass Media Bureau, a party to this case and the administrator of our environmental rules, did not comment on the dispute, we solicited its expert views. The Bureau acknowledges in comments, filed on December 19, 1989, that while ultimate local approval of the Buena Vista site is "questionable," it submits that Villamil has failed to show that such approval is "improbable," and that no site availability issue is warranted. Bureau Comments at 2-3 (citing *El Camino Broadcasting Corp.*, 12 FCC 2d 329, 330 (Rev. Bd. 1968)). The Bureau did not address the question of whether, or how, the Commission's own environmental rules may affect resolution of this matter.

5. Although future site approval by a local land use authority is always "questionable," certainly when a current local ordinance would require some form of waiver, variance or change to permit construction of broadcast

facilities, *see, e.g., Gainesville Media,* we believe that the facts here are more closely analogous to *Teton Broadcasting,* where a site issue was added on evidence that the chairman of the local board indicated that site approval was not likely to be forthcoming. The facts alleged here take the Buena Vista site beyond the merely questionable, and we believe that Villamil has made the "reasonable showing" required. Upon this record, there is a substantial and material question of fact which must be resolved. While we are always reluctant to remand a case otherwise ripe for decision, we are unable to resolve the dispute before us without a fuller showing on site availability.

6. ACCORDINGLY, IT IS ORDERED, That the proceeding IS REMANDED to the Presiding Officer for the adduction of additional evidence and the preparation of a Supplemental Initial Decision on the following issue:

> To determine whether Salinas Broadcasting Limited Partnership, Artichoke Broadcasting Corporation, Southern California Broadcasting Company, Crystal Communications, Inc., and California Community Television Network have a reasonable assurance of obtaining permission from the appropriate local authority for the construction of their proposed towers, antenna systems, and transmitter buildings at the Buena Vista site specified in their applications.

7. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence shall be on Villamil FM Radio, and the burden of proof shall be on each applicant specified in the added issue with respect to its own proposal.

8. IT IS FURTHER ORDERED, That the "Motion to Strike or for Acceptance of Supplement to Reply" filed January 5, 1990 by Villamil FM Radio IS GRANTED IN PART to the extent that Villamil's Supplement to Reply IS ACCEPTED.

9. IT IS FURTHER ORDERED, That the unopposed Petition for Leave to Amend filed June 6, 1989 by Crystal Communications, Inc. IS GRANTED, and the amendment IS ACCEPTED.

10. IT IS FURTHER ORDERED, That the Petition to Reopen Record filed May 2, 1989 by Artichoke Broadcasting Corporation, the Motions to Strike filed May 25 and 26, 1989 by California Community Television Network and Crystal Communications, Inc., respectively, the Motion for Leave to File Supplement and the Supplement filed September 18, 1989 by Crystal Communications, Inc., and the various responsive pleadings to these motions ARE REFERRED to the Presiding Officer.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Rule Making
filed by
GENERAL COMMUNICATION, INC. RM-7246

ORDER

Adopted: March 7, 1990; Released: March 9, 1990

By the Chief, Domestic Facilities Division:

1. The Alaska Public Utilities Commission (APUC), by its counsel, has requested a three (3) week extension of time until April 2, 1990 in which to respond to the above-captioned petition for Rule Making filed by General Communication, Inc. (GCI). GCI's petition requests the Commission to alter its policies governing the ownership and operation of domestic satellite earth stations in the bush communities in Alaska. Comments on GCI's petition are due on March 12, 1990. GCI opposes the APUC's extension request.

2. The APUC's request is granted. The Commission has always recognized the unique position the State of Alaska and the APUC play in the provision of telecommunication services to Alaska bush communities. Because of their special understanding of the problems confronting bush communities, the Commission has encouraged the State of Alaska and the APUC to take an active role in the development of service to bush communities. For this reason, the Commission is especially interested in getting the APUC's comments regarding bush earth station ownership and operation on the record. Given the importance of the APUC's input and the long deliberative history of the Alaska Bush proceeding, we find that the limited period of additional time will not significantly delay Commission consideration of GCI's petition. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, IT IS ORDERED that the period of time to file statements in support of or in opposition to General Communication, Inc.'s petition for Rule Making IS EXTENDED to April 2, 1990. IT IS FURTHER ORDERED that the date for filing replies to the April 2, 1990 pleadings is EXTENDED to April 17, 1990.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.
Transferor,

and I-T-C-90-043-TC

NYCOM INFORMATION SERVICES, INC.
Transferee,

Application for Authority to Transfer
Control of American Network Exchange,
Inc.

MEMORANDUM, OPINION AND ORDER

Adopted: March 7, 1990; Released: March 12, 1990

By the Chief, International Facilities Division:

1. On January 3, 1990, American Network Exchange, Inc. (Amnex) and NYCOM Information Services, Inc. (Nycom) filed an application requesting authority to transfer the Section 214 international resale authorization of Amnex to Nycom in connection with the merger of the two companies. The parties also requested additional authority for Nycom to resell international switched voice service of AT&T. On January 19, 1990, the parties filed an amendment and supplement to their application withdrawing the request, without prejudice, for additional Section 214 authority. The original application was placed on public notice January 24, 1990. No comments were received.

2. The parties state that Nycom is a publicly held New York corporation headquartered in Stamford, Connecticut. Nycom is a non-dominant carrier that resells domestic interexchange service pursuant to the regulatory forbearance policies established in the Commission's *Competitive Carrier* proceeding. Nycom provides its services by reselling capacity from underlying facilities-based carriers and has a significant customer base in New York, Massachusetts, Maryland, New Jersey and Pennsylvania, the parties state.

3. Amnex, formed in 1987, is a privately held Florida corporation that provides domestic interexchange service as a non-dominant carrier subject to regulatory forbearance under the Commission's *Competitive Carrier* policies, according to the parties. The parties state that Amnex provides domestic interexchange service by leasing a mix of telephone services from facilities-based carriers and Amnex has a significant subscriber base in approximately 30 states. Amnex began operation as an international resale carrier in 1989.[1]

4. The parties state that Amnex Acquisition Corp. (AAC) was formed as a wholly owned subsidiary of Nycom for the sole purpose of facilitating the proposed merger. AAC, incorporated in Delaware, currently is located at the same address as Nycom, does not hold any FCC radio station licenses and will change its corporate name to American Network Exchange, Inc. as part of the proposed merger transaction. Neither Amnex, Nycom nor the subsidiary AAC are directly or indirectly controlled by a foreign telecommunications entity, the parties state, adding that no principal shareholder of the stock of the companies, director or officer of Amnex, Nycom or AAC is a foreign telecommunications entity, an employee, agent or representative of a foreign telecommunications entity.

5. The parties describe themselves as competitive long distance service providers that serve numerous large and small businesses in contiguous but overlapping regions of the United States. They state they will realize significant operational, financial and marketing advantages by consolidating their businesses. Under the Agreement and Plan of Merger, Nycom will acquire control of Amnex by merging Amnex into AAC and converting each outstanding share of Amnex common stock into 1.965 share of Nycom common stock.[2] The applicants explain that Amnex will cease to exist and all assets, properties, liabilities and obligations of Amnex will, by operation of law, become the assets, properties, liabilities and obligations of AAC. The entity surviving the merger, AAC/Amnex, will remain a Delaware corporation that is wholly owned by Nycom and all Amnex shareholders will become instead shareholders of Nycom.[3]

6. Upon review of the application, we find that the acquisition will offer some benefits to Amnex's and Nycom's customers and will not entail substantial changes in service by Amnex or Nycom. The merger and restructuring will permit both carriers to compete more effectively in the international switched voice service marketplace.

7. We must also address the issue of whether this transaction will inhibit competition and thereby be detrimental to the public interest. Section 7 of the Clayton Act proscribes the acquisition of stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[4] Under Section 11 of that statute, the Commission is empowered to enforce Section 7 in the case of "common carriers engage in wire or radio communications or radio transmissions of energy."[5] The courts have construed this to mean the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act of 1934, as amended, "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[6] In brief, we are required to consider anti-competitive consequences as one factor in our public interest consideration. In the present instance, both Amnex and Nycom are non-dominant carriers and this proposed transaction does not appear to adversely impact the marketplace.

8. In view of the foregoing, we conclude that Nycom's acquisition of the Section 214 authorization held by Amnex to provide international switched voice resale services will serve the public interest.[7] This authorization will increase both the service area and the underlying service that Nycom may resell.

9. Accordingly, IT IS ORDERED that the application of American Network Exchange, Inc, and NYCOM Information Services, Inc. File No. I-T-C-90-043-TC, IS GRANTED and Nycom is authorized to acquire the Section 214 authorization in File No. I-T-C-89-148 from Amnex.

10. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of execution.

11. IT IS FURTHER ORDERED that Nycom shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. Section 203 and Part 61 of the Commissions Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

12. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F. R. Section 43.61 (October 1, 1988)

13. IT IS FURTHER ORDERED that Nycom/AAC is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI Telecommunications Corp.'s Tariff F.C.C. No. 1, and US Sprint's Tariffs F.C.C. Nos. 1 and 2, between the U.S. and those points listed in aforementioned tariffs in accordance with Amnex's previous authorization in File No. I-T-C-89-148, 4 FCC Rcd 7054 (1989).

14. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] American Network Exchange, Inc., File No. I-T-C-89-148, 4 FCC Rcd 7054 (1989).

[2] The parties state that under certain conditions, the conversion ratio could be reduced to 1.923.

[3] The converted shares in the aggregate will amount to no more than approximately 13 percent of the Nycom shares issued and outstanding at the time the merger becomes effective.

[4] 15 U.S.C. Section 18.

[5] 15 U.S.C. Section 21.

[6] United states v. FCC, 652 F.2d 77, 88 (D.C. Cir. 1980).

[7] Nycom was authorized to resell the international switched voice services set forth in MCI Telecommunications Corp.'s Tarrif F.C.C. No. 1 and US Sprint's Tarriff F.C.C. No. 1. *See* File No. I-T-C-89-112, 4 FCC Rcd 6525 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

CORRECTED

MM Docket No. 89-94

In the Matter of

Amendment of Section 73.202(b), RM-6631
Table of Allotments,
FM Broadcast Stations.
(Huron, South Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 29, 1990; Released: March 7, 1990

By the Chief, Allocations Branch:

1. At the request of Dakota Broadcasting, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 3901 (1989), proposing the substitution of Channel 256C1 for Channel 221A at Huron, South Dakota, and the modification of its license for Station KURO-FM to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted.[1] Dakota Communications, Ltd. ("Dakota"), also filed comments.

2. Dakota supports the modification of Station KURO-FM's license to specify Channel 256C1. Further, it requests that the additional equivalent class channel identified by the petitioner, Channel 286C1, be allotted as a Class A or that Channel 221A remain allotted to Huron. Should it not be possible to retain Channel 221A or allot Channel 286 as a Class A, it states that it will apply for Channel 286C1. However, Dakota believes that a combination of one Class C1 and one Class A station would be more than adequate to serve the needs of Huron and the surrounding area as well as being economically feasible. While it would prefer that Channel 286A be allotted to Huron, it states that the retention of Channel 221A would also be acceptable.

3. We believe the public interest would be served by allotting Channel 256C1 to Huron, South Dakota, and modifying petitioner's license for Station KURO-FM accordingly, since it could enable the station to expand its coverage area. No other party expressed an interest in use of the channel at Huron. Therefore, in accordance with Section 1.420 of the Commission's Rules, we will modify petitioner's license to specify the non-adjacent higher powered channel. We also believe that the public interest would be served by allotting Channel 286A to Huron, since an interest has been expressed in providing the community with a second local FM service. The public interest requires prompt initiation of new service, a goal which we believe can best be accomplished by allotting Channel 286A to Huron. *See Lawton, Oklahoma*, 4 FCC Rcd 1807 (1989).

4. Channel 256C1 can be allotted to Huron in compliance with the Commission's minimum distance separation requirements and can be used at Station KURO-FM's present transmitter site. Channel 286A can be allotted to Huron in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 23, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Huron, South Dakota	256C1, 286A

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Dakota Broadcasting, Inc., for Station KURO-FM, Huron, South Dakota, IS MODIFIED to specify operation on Channel 256C1, in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. The filing window for applications for Channel 286A at Huron, South Dakota, will open on **April 24, 1990,** and close on **May 24, 1990.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Informal letters in support of the allotment were also filed by various members of the Huron community, such as the Norwest Bank South Dakota, N.A., American State Bank, Huron Chamber of Commerce, Office of the Mayor of the City of Huron, and Anderson Furniture Company.

[2] The coordinates for Channel 256C1 are North Latitude 44-20-46 and West Longitude 98-12-34. The coordinates for Channel 221A are North Latitude 44-21-36 and West Longitude 98-13-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-99

In re Applications of

PALMETTO BROADCASTING SYSTEM, INC. (hereafter "Palmetto") File No. BPH-880322MB

JEFFREY C. SIGMON (hereafter "Sigmon") File No. BPH-880324NK

STEVEN C. STEWART (hereafter "Stewart") File No. BPH-880324OI

For Construction Permit
for a New FM Station on Channel 291A
in Kershaw, South Carolina

HEARING DESIGNATION ORDER

Adopted: February 22, 1990; Released: March 13, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Palmetto petitioned for leave to amend its application on June 16, 1988 and July 18, 1988 and Stewart petitioned for leave to amend on January 13, 1989. The accompanying amendments were filed after May 5, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

3. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Palmetto has filed such statement, it is deficient. Palmetto has not listed sources from which it would recruit African Americans or women. Accordingly, Palmetto will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IS IS FURTHER ORDERED, That the petitions for leave to amend filed by Palmetto and Stewart ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Palmetto shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-124

In the Matter of

VIRGIN ISLANDS TELEPHONE CORPORATION
Tariff F.C.C. No. 1

Transmittal No. 6

Switched and Special Access
Rate Adjustment

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: March 6, 1990; Released: March 6, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 29, 1989, the Common Carrier Bureau initiated an investigation into the reasonableness of the interim switched and special access rates filed by the Virgin Islands Telephone Corporation (Vitelco) under Transmittal No. 6.[1] The *Investigation Order* suspended those rates for one day and ordered Vitelco to keep accurate account of all amounts received pursuant to the interim rates. Transmittal 6 became effective January 2, 1990. By this Order, we designate the specific issues to be examined and establish schedules and procedures for the filing of pleadings.

II. BACKGROUND

2. In Transmittal 6, Vitelco argued that its current switched and special access rates did not accurately reflect the level of demand in the U.S. Virgin Islands following the damage caused by Hurricane Hugo in September 1989. Tr. No. 6, Section II, Reason for Filing at 1. Vitelco argued that because of prohibitions against retroactive ratemaking, the only way it could recover revenue losses since the hurricane would be through an increase in its access rates. Therefore, Vitelco sought to restore its revenue stream to pre-hurricane levels by increasing its interstate access rates in direct proportion to the decrease in demand. *Id.* at 1, 4. This increase set forth in Transmittal 6 raised switched access rates an average of 28.5 percent and special access rates approximately 2 percent. Tr. No. 6, Section I, Explanation of Changed Matter at 1. Vitelco explained that the revised rates did not include any increase to cover losses due to premature plant retirement and extraordinary maintenance expenses attributable to the hurricane. Tr. No. 6, Section II, Reason for Filing at 4-5.

3. We concluded in the *Investigation Order* that it is in the public interest to allow Vitelco's interim rate increase to become effective. However, in order to guard against potential overearnings stemming from the rate increase, we suspended Transmittal 6 for one day, imposed an accounting order, and initiated an investigation into the reasonableness of these rates.[2]

III. DESIGNATION OF ISSUES TO BE INVESTIGATED

4. The purpose of this investigation is to determine whether the Transmittal 6 rates may be excessive, *i.e.*, whether the rates for an access element produce revenues that exceed a revenue requirement that is computed in accordance with Part 69 of the Commission's Rules. Vitelco is directed to submit a direct case demonstrating that the Transmittal 6 rates are not excessive. That direct case must include the following information:

A. ***Costs***

(1) Explain the accounting and ratemaking treatment of premature plant retirement, extraordinary maintenance expense, and insurance claims or settlements during the period beginning September 1, 1989 and ending January 1, 1990, and for the period beginning January 2, 1990 and ending with the most recent data available.

(2) Specify all costs related to premature plant retirement, extraordinary maintenance expense, and insurance claims or settlements on a monthly basis for total company interstate and all interstate access elements (Common Line, Switching, Information, Local Transport, and Special Access) for the period beginning September 1, 1989 and ending January 1, 1990, and for the period beginning January 2, 1990 and ending with the most recent data available.

(3) Specify earnings and rate of return on a monthly and total basis and in relation to the interstate access elements listed above. Show all earnings, investment, expenses, taxes, and revenues, and detail the inclusion of any costs or revenues related to premature plant retirement, extraordinary maintenance expense, and insurance claims or settlements in these earnings, investment, expenses, taxes, and revenues. Provide the above information for each of the following time periods: (a) January 1, 1989 through August 1, 1989 (b) September 1, 1989 through January 1, 1990 (c) January 2, 1990 through the most recent period for which data is available.

B. ***Demand***

(1) Provide actual demand and revenue data on a monthly basis for the period beginning September 1, 1989 and ending January 1, 1990 and for the period beginning January 2, 1990 and ending with the most recent data available.

(2) Compare the above data with the estimates contained in Transmittal No. 6.

IV. PROCEDURAL REQUIREMENTS

5. This investigation will be conducted as a notice and comment proceeding. Vitelco is designated as a party. Vitelco shall file its direct case no later than **April 6, 1990**. The direct case shall present Vitelco's position with respect to the issues described in this Order. Pleadings

responding to the direct case may be filed no later than **May 4, 1990**, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." Vitelco may file a "Rebuttal" to oppositions or comments no later than **May 18, 1990**.

6. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial firm for copying, International Transcription Service, Inc. (ITS), Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554.

7. For the purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules. The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* Section 1.1202(f) of the Commission's Rules. During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* Section 1.1203 of the Commission's Rules.

8. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding; or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity to be present. *See* Section 1.1202(b) of the Commission's Rules. Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of the presentation under separate cover to the Secretary of the Commission for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

9. Any person, who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in the proceeding involved shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. *See* Section 1.1206 of the Commission's Rules.

V. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 403, and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the issues set forth in Section III, *supra*, ARE DESIGNATED FOR INVESTIGATION.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Virgin Islands Telephone Corporation, 5 FCC Rcd 112 (Com.Car.Bur. 1989) (*Investigation Order*).

[2] *Investigation Order*, 5 FCC Rcd at 112.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 82-243

In the Matter of

Amendment of Parts 1, 21, 22, 74, and 94 of the Commission's Rules to Establish Service and Technical Rules for Government and non-Government Fixed Service Usage of the Frequency Bands 932-935 MHz and 941-944 MHz.

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: February 8, 1990; Released: March 15, 1990

By the Commission:

1. By this action, the Commission clarifies certain aspects of its *Second Report and Order* in the above-captioned proceeding in response to five petitions for clarification/reconsideration. This action addresses the issues of when frequency coordination is necessary and what procedures are to be followed in coordinating applications. In addition, it sets forth criteria for determining when applications will be considered mutually exclusive and establishes procedures for selecting among competing applicants. Finally, this action considers several technical issues related to the use of the frequency bands 932-935 MHz and 941-944 MHz, including one-way, unpaired operation and the appropriate power limit specifications.

BACKGROUND

2. In November 1984, the Commission adopted a *First Report and Order* in this proceeding that allocated the bands 932-935/941-944 MHz for Government and non-Government fixed service usage on a co-primary basis.[1] The *First Report and Order* specified that existing broadcast auxiliary, common carrier, and private users would be eligible to share these bands with Government users.

3. In the *Third Notice of Proposed Rule Making* (*Third Notice*), the Commission proposed procedures and rules to be followed in sharing the 932-935/941-944 MHz bands between Government and non-Government users.[2] In February 1989, the Commission adopted a *Second Report and Order*, finalizing procedures and rules for using the 932-935/941-944 MHz bands. [3] Specifically, the *Second Report and Order* designated the 932-932.5/941-941.5 MHz bands for point-to-multipoint use and the 932.5-935/941.5-944 MHz bands for point-to-point use, specified that these bands are primarily intended for two-way use, specified that coordination between Government and non-Government users would be accomplished via the Interdepartment Radio Advisory Committee of the National Telecommunications and Information Administration (NTIA), specified that there would be an initial one-week window for the filing of applications, and specified that lotteries would be used to choose among mutually exclusive applications.

4. In April 1989, five parties filed Petitions for Clarification and/or Reconsideration of the *Second Repon and Order*. Specifically, Motorola, Inc. (Motorola) and the Utilities Telecommunications Council (UTC) each filed a *Petition for Clarification*, Paging Network, Inc. (PageNet) filed a *Petition for Reconsideration*, Telocator filed a *Petition for Limited Reconsideration*, and PacTel Paging, Inc. (PacTel) filed a *Petition for Clarification and / or Reconsideration*.[4] For the most part, the petitions concern the point-to-multipoint portion of the allocation; *i.e.*, the 932-932.5/941-941.5 MHz bands. The petitions for clarification address the issues of frequency coordination and mutual exclusivity/lottery procedures, while the petitions for reconsideration raise issues concerning one-way, unpaired use of the point-to-multipoint bands.

5. The American Petroleum Institute (API) filed an opposition to certain aspects of PageNet's, Telocator's, and PacTel's Petitions in May 1989. API contends that the Commission should affirm its decisions with respect to single channel use of the 932-932.5/941-941.5 MHz bands. Replies to API's Opposition were filed by PageNet, Telocator, and PacTel.[5] A discussion of each of the issues raised in the petitions, opposition and replies, and our decision on these issues follows.

DISCUSSION AND DECISIONS

Frequency Coordination

6. Motorola requests clarification of the frequency coordination procedures that will be used in the 932-935/941-944 MHz bands. Specifically, it asks how the different coordination procedures used by private and common carrier applicants are to be rationalized under one approach and whether applicants filing during the initial one-week window must submit evidence of frequency coordination. In this latter respect, it asks how information about existing broadcast auxiliary users in the 942-944 MHz bands will be made available.

7. *Decision*. With the exception of the 942-944 MHz bands, we believe that frequency coordination is unnecessary for applications submitted during the initial filing window because there will be no licensees with whom to coordinate. However, after the initial filing window has closed and licenses have been issued, subsequent applications for point-to-point channels must include evidence that frequency coordination has been performed with existing users in accordance with Section 21.100(d) of the Rules. The Section 21.100(d) frequency coordination criteria are being applied to both private and common carrier applicants because they have been successfully used in other bands.[6] As detailed in paragraph 17, *infra*, a case-by-case evaluation will be made by the Commission to determine frequency reuse on point-to-point channels for the initial filing window. With respect to point-to-multipoint channels in the 932-932.5/941-941.5 MHz bands, a fixed co-channel mileage separation will be used by the Commission to determine frequency reuse. *See* paragraph 14, *infra*. Therefore, point-to-multipoint applicants need only show compliance with the 70 mile co-channel separation standard unless an applicant wishes to apply for a waiver to use a lesser mileage separation.[7]

8. In the 942-944 MHz bands, frequency coordination will also be required for applications filed during the initial filing window. As discussed in the *Report and Order* in GEN Docket No. 82-335, there remain 121 one-way broadcast auxiliary stations operating in the 942-944 MHz band on a grandfathered basis.[8] In order to prevent interference to these stations, applications for authority to operate in this band will have to be coordinated with them both during the initial filing window and thereafter. In the near future, we will be issuing a public notice that will solicit applications for the 932-935/941-944 MHz bands and that will list in an appendix the frequencies and locations of the existing broadcast auxiliary stations. Applications for the 942-944 MHz band must include evidence that frequency coordination has been performed with these existing stations in accordance with Section 21.100(d) of the Rules.

Mutual Exclusivity and Lottery Procedures

9. Motorola requests that the Commission clarify that all mutually exclusive Government and non-Government applications will be placed in the same lotteries, rather than be considered separately. UTC supports this aspect of Motorola's petition. UTC contends that separating Government from non-Government applications would be inequitable because there are likely to be many more non-Government applications.

10. PageNet states that because the Commission anticipates a large number of point-to-multipoint applications during the initial filing window, the Commission should assign channels among all qualified applicants, rather than allow applicants to apply for particular channels. Under this circumstance, according to PageNet, lotteries will not be necessary unless there is an insufficient number of nonmutually exclusive channels to assign. PacTel also believes that the Commission should be the arbiter of which frequency is assigned to an applicant. PacTel states that if applicants are allowed to request particular frequencies, many mutually exclusive situations will result, thus necessitating lotteries. To avoid this, according to PacTel, applicants should be permitted to specify frequency preferences, but the Commission should make the final decision as to which frequency is assigned to which applicant.

11. Finally, Motorola asserts that the *Second Report and Order* failed to indicate how mutual exclusivity would be determined. It requests that the Commission clarify that the ninety mile co-channel master station distance separation specified for private users under Part 94 will be used to determine mutual exclusivity among point-to-multipoint applications. PacTel also addresses the issue of the appropriate distance separation for co-channel point-to-multipoint master (or control) stations.[9] According to PacTel, the seventy mile separation currently used by common carrier control stations is adequate to avoid interference while at the same time maximizing spectrum efficiency.

12. *Decision*. Petitioners raise several interrelated issues. As an initial matter, we must decide whether Government and non-Government applications are to be treated the same or differently with regard to the resolution of cases of mutual exclusivity. As discussed above, Motorola, UTC, and API express support for grouping the Government and non-Government applications together, and no party favors separating them.[10] We find that grouping the applications is a more equitable way to proceed, since it can be expected to result in a distribution of licenses in each geographic area approximately proportional to the number of Government and non-Government applications received.

13. We next concur with PageNet and PacTel that the Commission should assign point-to-multipoint channels initially. Because there are no significant differences between point-to-multipoint frequency pairs, we find that these channels should be treated as fungible during the initial filing window. Therefore, while we will permit these applicants to specify a channel preference during the initial window, we will make all assignments and will consider applications to be mutually exclusive only if there are more applications than channels in a geographic area. By proceeding in this manner, we believe that we will be ensuring equitable treatment of all applications while at the same time minimizing the number of mutually exclusive applications in any one geographic area.

14. We will use the seventy mile control station co-channel distance separation currently specified in Part 22 of our Rules to determine which point-to-multipoint applications for the bands addressed herein are mutually exclusive.[11] We believe that for the 932-932.5/941-941.5 MHz bands, the seventy mile separation currently specified for common carrier point-to-multipoint users under Part 22 is preferable to the ninety mile separation currently specified for private users under Part 94.[12] While it is true that a larger separation would provide greater assurance of interference-free service, we find that seventy miles is adequate for the needs of all common carrier and many private radio users. Further, given the large volume of point-to-multipoint applications anticipated in the new bands, we are convinced that there is a critical need to reuse channels as intensively as practicable.

15. Notwithstanding the somewhat lesser distance separation that we are adopting for the point-to-multipoint channels, we note that there is a strong likelihood of some rather long "daisy chains" of mutually exclusive applications developing during the initial filing window. This is due to the fact that many large metropolitan areas are within seventy miles of each other. For example, many applications in the Washington, DC Metropolitan Statistical Area (MSA) will be within seventy miles of applications in the Baltimore MSA. Further, some greater Baltimore area applications will be within seventy miles of applications in the greater Philadelphia area, which in turn will be within seventy miles of applications in the greater New York area, etc. Thus, we recognize that it is highly unlikely that we will be able to eliminate the need for one or more lotteries with respect to point-to-multipoint applications.

16. Because of the effort necessary to handle this "daisy chain" problem, we will hold a nationwide lottery among point-to-multipoint applicants. This lottery process will include a ranking of all acceptable point-to-multipoint applications, whether or not they are mutually exclusive with other applications. We will use a ranking procedure to avoid the time-consuming task of determining upon receipt of the applications which are mutually exclusive. To simplify the ranking procedure, we will assign a number to each point-to-multipoint application that has not been dismissed or otherwise found unacceptable.[13] A random drawing of all the assigned numbers will be conducted to determine the order in which applications are to be ranked.[14] After this ranking is completed, applications will be assigned channels in rank order. To the

extent possible, each applicant will be assigned its channel preference. When this is not possible, or if no channel preference is specified, the lowest available channel will be assigned. If it is not possible to grant an application, that application will be dismissed. The process will continue until all applications have either been assigned a channel or dismissed.

17. Regarding point-to-point applications, we will require that applicants select a channel and, as discussed in paragraph 8, show evidence of coordination with potentially-affected broadcast auxiliary licensees. We cannot treat point-to-point channels as fungible, due to these pre-existing broadcast auxiliary users. However, we believe that we ultimately will be able to satisfy virtually all of the point-to-point requirements of those filing during the initial window without the need for lotteries. While we anticipate that many point-to-point applications will be filed, we also believe that there will be adequate channels available for these applications.[15] Further, point-to-point operations do not require the extensive protected service area that point-to-multipoint applications do. Accordingly, we will proceed by sorting applications that have not been dismissed or otherwise found unacceptable by channel requested and will initially assign channels for which there is only one application in a geographic area. At the end of this process, we will determine the applications that are mutually exclusive by making a case-by-case determination of interference potential between two applicants and whether there are other available channels in the same channel group that would not impact on existing broadcast auxiliary users. If there are other channels available, we will issue a public notice listing these channels and afford the mutually exclusive applicants the opportunity to resolve these situations by applying for a different channel. To the extent that there are no other available channels or to the extent that mutually exclusive applications remain after this process is concluded, we will then conduct lotteries for each channel among all remaining mutually exclusive applications, assuming appropriate coordination with existing broadcast auxiliary stations can be concluded, where necessary.

18. After the initial assignment process has concluded for both point-to-point and point-to-multipoint channels, the Commission will issue a list or lists of all applications that have been granted.[16] At that time we will also establish the date after which new applications can be filed for the use of this spectrum. From that date forward, applications will be processed on a daily first-come, first-served basis. In the event of mutually exclusive applications that are filed on the same day, lotteries will be held for each channel in accordance with our normal lottery procedures.[17]

Use of the Point - to - Multipoint Bands for One - Way Operations

19. In the *Second Report and Order*, we stated that the 932-935/ 941-944 MHz bands "are primarily intended for two-way use, but requests to utilize half of a channel pair to satisfy a single channel requirement will be considered upon a showing that spectrum efficiency will not be impaired, and that unpaired spectrum is not available in other bands."[18] PageNet, PacTel, and Telocator each request that the Commission reconsider this decision with respect to the point-to-multipoint channels and permit one-way or "single" channel use in the 932-932.5/941-941.5 MHz bands on a routine basis. They assert that for paging control operations, use of a single unpaired channel is usually sufficient. Thus, they argue that assigning a paired channel for this type of use would be a waste of spectrum in most cases. API opposes these reconsiderations, contending that mixing one-way and two-way use in the same spectrum is inherently inefficient.

20. PageNet argues that Part 22 point-to-multipoint use differs substantially from Part 94 use, in that there is no need for a separate response channel in one-way Part 22 use. According to PageNet, the primary flow of information in a Part 22 system is from a paging control station to multiple remote base station paging transmitters to multiple paging receivers. PageNet asserts that a separate response channel could be used to provide the control station with diagnostic information about the remote base stations. It notes, however, that such operation would be inefficient because modern equipment provides for the paging frequency itself to be used for this purpose. PageNet therefore argues that single channel use of point-to-multipoint spectrum by Part 22 paging systems should be permitted to discourage inefficient two-way, paired use of these channels. It further contends that at least some portions of the 932-932.5 MHz band would be subject to interference from paging systems at 931-932 MHz, rendering some 932-932.5 MHz channels unavailable for paired use with 941-941.5 MHz channels. Thus, according to PageNet, the Commission should allow unpaired use of these 941-941.5 MHz channels to achieve some degree of utilization, rather than requiring two-way use and achieving no utilization.

21. PacTel contends that splitting the channel pairs would permit the control of two distinct paging systems. Therefore, according to PacTel, permitting unpaired channel use only upon a special showing would impair spectrum efficiency. Telocator similarly argues that the Commission can facilitate the provision of spectrum to control two different paging systems via the splitting of a paired channel. According to Telocator, some common carriers may seek to use a channel pair to control two paging systems operating on different frequencies. Telocator contends that although the 932-932.5 MHz band and the 941-941.5 MHz band have very different power limits, both bands may be used effectively for control purposes. Telocator further argues that the Commission can promote efficiency by considering likely service areas as it splits channels to accommodate carriers in the same geographic area.

22. In contrast, API contends that routine one-way use of the point-to-multipoint channels should not be permitted, since such a practice would leave "orphaned channels" scattered throughout the 932/941 MHz bands. API asserts that these channels would then be unusable by the majority of private multiple address (Part 94) applicants. According to API, the multiple address service was conceived as a two-way service and allowing unpaired use would change the primary use of the 932/941 MHz bands from multiple address to paging or other one-way services. API argues that such a transformation would be highly inefficient.

23. *Decision.* We concur with PageNet, PacTel, and Telocator that routine one-way control of common carrier paging systems using the 932-932.5/ 941-941.5 MHz bands is desirable. Private carrier paging operators also have a growing need for one-way control frequencies. Further, we understand from the NTIA that Government entities

have point-to-multipoint requirements that might be efficiently satisfied by use of a single channel in the 932-932.5/ 941-941.5 MHz bands. In light of the efficiency with which paging operators are able to use an unpaired channel for this purpose, a showing of spectrum efficiency now appears to us to be unnecessary. While this represents a change from our decision in the *Second Report and Order*, we note that no party commenting on the *Third Notice* specifically addressed the question of one-way channel use by paging operators.[19] We share API's concerns about the potential for one-way applicants to make inefficient use of the new spectrum by creating "orphan channels;" however, we believe that greater inefficiency would result from requiring an applicant to use a channel pair when its needs could be met with a single channel.

24. Accordingly, we will routinely permit single channel, unpaired use of the point-to-multipoint bands and not require that such requests be accompanied by special showings.[20] Applicants for single channel use in these bands, like applicants for paired channels, will be permitted to request particular frequencies. We recognize, however, that since the maximum allowable power in the 941-941.5 MHz band exceeds that allowed in the 932-932.5 MHz band by twenty times (13 dB), more applicants will likely prefer to use the upper band channels than the lower band channels. Therefore, to ensure that we maximize the efficient use of this spectrum by reducing the likelihood of "orphaned channels," we will require single channel applicants to apply for a 932 MHz channel (*i.e.*, the lower power channel) if all planned remote stations are located within 48 kilometers of the master/control station. Our engineering analysis convinces us that for most cases, stations operating on the 932 MHz channels can be designed such that reliable communications will occur over this distance.[21] This method of proceeding will enable us to ensure that this spectrum continues to be used efficiently. Finally, we note that single channel applications will be placed in the same lottery as paired channel applications.

Relocation of Point - to - Multipoint Bands

25. PageNet requests that the lower point-to-multipoint band be relocated from 932-932.5 MHz to the 934 MHz band. It asserts that this change is needed because point-to-multipoint users in the 932-932.5 MHz band may experience interference from paging operations in the 931-932 MHz band. PageNet notes that in their comments to the *Third Notice*, Gencom Incorporated and Omni Communications, Inc. also suggested that the lower point-to-multipoint band be located at 934 MHz.

26. *Decision*. Beyond its very general allegation, PageNet has not demonstrated that there is a significant band edge interference problem at 932 MHz between paging operations in the 931-932 MHz band and point-to-multipoint operations in the 932-932.5 MHz band. We believe that this situation is no different than the situation discussed in footnote seven, *supra*, that may develop between point-to-point and point-to-multipoint operations at the band edges. In both cases, we believe that interference can be avoided if systems are carefully engineered. We also note that PageNet does not offer a detailed frequency plan; *e.g.*, while PageNet recommends that the lower point-to-multipoint band be relocated, it does not state whether the upper point-to-multipoint band should also be relocated or whether the lower point-to-point band should begin at the 932 MHz band edge or some higher frequency. Accordingly, PageNet has not provided us with sufficient reason to change the frequency plan set forth in the *Second Report and Order*.

Two Versus Four Base Stations on Point - to - Multipoint Channels

27. Section 22.501(g)(1) of the Commission's Rules states that at least four remote base stations must be served by a point-to-multipoint licensee. Telocator proposes that the Commission modify this section to allow use of point-to-multipoint channels when carriers are proposing to serve only two remote stations. In support of this proposal, Telocator asserts that a simulcast paging system requires the use of radio control when only two remote stations are to be served and that such a change will facilitate the entrance of new carriers into the marketplace.

28. API opposes Telocator's proposal, contending that what Telocator is seeking is a fundamental alteration of the point-to-multipoint spectrum. According to API, the use of two, rather than four remote stations, would be inefficient and would accelerate congestion in many markets. API states that point-to-point, rather than point-to-multipoint, channels should be used to satisfy the needs of users with only two remote stations.

29. *Decision*. We agree with API that reducing the number of remote stations from four to two would be inefficient.[22] From its inception, the point-to-multipoint service has involved a minimum of four remote stations interfacing with a master or control station, and there has been no shortage of point-to-multipoint applicants. Quite to the contrary, there has been a shortage of channels. While the actions we are taking in the instant proceeding will help satisfy demand, decreasing the number of required remote stations to be served would largely offset this increased channel allotment. We agree with API that applicants seeking to communicate with only two remote stations should use point-to-point links. Therefore, we decline to adopt Telocator's proposal.

25 kHz Channels for Paging Use

30. The *Second Report and Order* specified the use of 12.5 kHz channels for point-to-multipoint use. However, it stated that "[t]o permit flexibility, applicants for either point-to-point or point-to-multipoint channels will be permitted to combine channels upon a showing that there is a need and sufficient frequencies are available to permit this."[23] PageNet asserts that it will be some time before 12.5 kHz equipment for paging systems becomes available. Therefore, it proposes that 25 kHz equipment be allowed to be used for point-to-multipoint operations on a routine basis in the interim. API opposes this request, stating that PageNet has not met its burden of demonstrating a lack of availability of 12.5 kHz equipment.

31. *Decision*. We agree with API that PageNet offers no compelling reason why 25 kHz channels should be permitted in the point-to-multipoint spectrum on a routine basis. We believe that 12.5 kHz equipment for paging systems will develop rapidly, as there are no technical or economic reasons barring its introduction. Also, as noted above, 12.5 kHz channels may be combined upon a showing of need, although we intend to look very carefully at

any such showing. It is imperative to foster spectrum efficiency in this band through the use of 12.5 kHz channels. Therefore, we will not grant PageNet's request.

Specification of Power

32. PageNet and Telocator state that the Part 22 rules for operation in the 932-932.5/941-941.5 MHz bands should specify effective radiated power (ERP) rather than effective isotropic radiated power (EIRP). They contend that ERP provides a simpler means for calculating the radiation characteristics of systems and that the use of EIRP in Part 22 may be confusing and lead to needless rejection of applications. Telocator also contends that the limit on transmitter power in Section 22.501 should be removed, arguing that transmitter power has little to do with interference potential.[24]

33. *Decision*. With respect to the first proposal, we note that EIRP can be converted to ERP simply by subtracting 2.15 dB from the relevant EIRP figure. However, we also note that the Commission's Rules have traditionally specified power limits in watts ERP in Part 22 and dBW EIRP in Part 94. Therefore, in the interests of minimizing confusion to users, we will continue this tradition. The watts ERP equivalents to the +17 dBW EIRP figure listed for the 932-932.5 MHz band and the +30 dBW EIRP figure listed for the 941-941.5 MHz band in Sections 22.501 and 94.71 in the *Second Report and Order* are (to the nearest round numbers) 30 watts and 600 watts, respectively. We will therefore use these ERP figures in Part 22, while continuing to use the EIRP figures in Part 94.

34. Regarding Telocator's second proposal, we agree that specifying maximum allowable transmitter power is unnecessary in the 932-932.5/941-941.5 MHz bands. While we have traditionally specified maximum transmitter power as a safeguard to help ensure that ERP or EIRP is not excessive, we believe that this specification may hamper system design in these bands. It may be possible, for example, for a licensee to use greater transmitter power and still easily meet the ERP or EIRP requirements. Therefore, we will remove the specification of transmitter power in these bands in Part 22. Also, to give Part 94 users the same flexibility, we will remove this specification in Part 94 for operations in these bands as well.

Use of 932 - 932. 5 / 941 - 941. 5 MHz Bands to Control Paging Operations on Two - Way Channels And For Certain Two - Way Services

35. PacTel states that the 932/941 MHz channels should be available for controlling paging service offered on two-way channels, but it is unclear from the *Second Report and Order* whether this is the case. Telocator agrees that the new channels should be available for control of paging on two-way channels and further asserts that the Commission should also make clear that the 932/941 MHz channels are available for two-way services such as talk back paging and mobile data operations.

36. *Decision*. Our intent in the *Second Report and Order* was to permit the 932-932.5/941-941.5 MHz bands to be used for any point-to-multipoint operation that involves at least four remote base stations. Therefore, we will modify the rules to make it clear that it is permissible to use these bands to control paging or other voice and data operations on two-way channels provided that at least four remote base stations are employed.

Use of 941 MHz Frequencies for Relay Stations

37. PageNet and Telocator state that the Commission should clarify that the 941 MHz channels may be used not only for control stations, but also, when paired with the 932 MHz channels, for relay stations. In this type of use, a 932 MHz channel would serve as a point-to-point link to a 941 MHz channel, which would relay the communication to outlying paging base stations, which in turn would transmit the communication to individual paging receivers. Permitting such use is desirable, asserts PageNet, because of the need of paging systems to reach remote base stations in larger geographic areas.

38. API opposes using the 941 MHz channels for relay stations, asserting that this is simply an attempt to expand the channels available for point-to-point use. API states that the Commission should not permit any use of the new channels that derogates from general point-to-multipoint use.

39. *Decision*. We agree with PageNet and Telocator that permitting relay use of the 941 MHz channels is desirable. While a point-to-point link from a 932 MHz channel would be involved in this type of arrangement, it would facilitate the control of multiple paging base stations. Therefore, this type of use would not significantly derogate from general point-to-multipoint use. However, we wish to emphasize that we are not permitting routine point-to-point use of the 932 MHz channels nor are we permitting the higher power levels authorized on the 932.5-935/941.5-944 MHz point-to-point channels to be used at 932 MHz. Point-to-point use of the 932 MHz channels will be permitted in conjunction with relay use of the 941 MHz channels for relay transmissions so long as a minimum of four remote stations are involved. In this way, the control station will appear as a remote station transmitting on 932 MHz while four remote stations are receiving the 941 MHz frequency. This type of operation thus appears as a two-way system with five remotes, one being for transmit only and four being for receive only. Of course, the 70 mile reuse criteria will be determined from the 941 MHz relay station and not the 932 MHz control station.

Part 22 Nomenclature

40. Telocator argues that the 932 MHz frequencies should be called control, rather than base, stations, and that the 941 MHz frequencies should be called control/relay, rather than simply control, stations. Telocator asserts that the current nomenclature does not conform with the concepts embodied in Part 22 of the Commission's Rules and the usual practices of the radio common carrier industry. Telocator contends that under the current nomenclature, it would be impermissible for the 932 MHz ("base station") frequency of a 932/941 MHz channel pair to transmit to a 941 MHz station and then to have the communication retransmitted to multiple remote paging base stations, since, according to Section 22.509 of the Commission's Rules, base stations may not communicate with each other. However, contends Telocator, this type of use of the 932 MHz band would not be base station use at all but rather would be control use. Furthermore, the use of the 941 MHz band in this case would actually be relay, rather than control, use. Therefore, Telocator submits that the nomenclature be changed to reflect anticipated use of the new bands by common carriers.

41. *Decision*. As discussed in paragraphs 37-39, we are herein authorizing relay use of the 941 MHz band under Part 22. Therefore, we have already favorably disposed of Telocator's recommended change regarding this band. Regarding its recommendation for the 932 MHz band, we note that currently the 932 MHz frequencies may be used for control purposes in unpaired configurations but are designated as base stations when paired with 941 MHz control frequencies. However, as discussed by Telocator, the term "base station" is misleading, since, in paired use by common carriers, there is no logical function to be performed by the 932 MHz frequencies except that of controlling remote base stations through a relay station. Inasmuch as we are now permitting relay use of frequencies at 941 MHz, we agree with Telocator that it is logical to redesignate the 932 MHz frequencies as control stations, regardless of whether the frequencies are used in unpaired or paired applications. Therefore, we are redesignating the 932 MHz frequencies as control stations and are redesignating the 941 MHz frequencies as either control or relay stations under Part 22 of our Rules.

Public Notice of Filing Dates

42. The *Second Report and Order* stated that the Commission was establishing an initial one-week filing window for accepting applications to operate in the Government/Non-Government Fixed Service, and that notice of this filing period would "be published in the Federal Register at least thirty days prior to the beginning of the filing period."[25] The *Second Report and Order* also stated that after the initial filing window, a filing date would be established wherein applications from that date forward would be accepted on a daily first-come, first-served basis.[26]

43. PacTel and PageNet contend that at least ninety days advance notice should be given of each filing period. They state that the volume of applications during each period is likely to be great and that parties should have adequate advance notice of each period in order to have sufficient time to prepare their applications. API disagrees with PacTel and PageNet, asserting that ninety days advance notice of filing periods is excessive. API says that thirty days is ample time to prepare applications and that lengthening the advance notice would create unnecessary delays and would be detrimental to the public interest.

44. *Decision*. We agree with API that thirty days advance notice is adequate, particularly as our rule making apprised interested applicants that this spectrum would soon be available. We note that the *Second Report and Order* was released approximately one year ago and that we are not herein changing the channel plan that we adopted at that time. We believe that applicants have had ample time to consider their channel requirements and do not need an extended period of advance notice. Therefore, we will hold to our initial decision and give thirty days advance notice of the initial window in a Commission public notice, and will also publish the filing window date in the Federal Register at least thirty days in advance of the opening of the window. This public notice will be released in the near future. After applications received during the initial window have been processed and licenses issued, we will announce by public notice when new applications for use of this spectrum will be accepted.

Other Matters

45. The radiofrequency (RF) emission limit standards for point-to-multipoint transmissions employing digital modulation techniques specified for the new bands in Appendix B of the *Second Report and Order* differ from those recently adopted in PR Docket No. 87-5 for point-to-multipoint channels in the 928/952/956/959 MHz bands. Since the standards adopted in PR Docket No. 87-5 are already in use and have proven successful in controlling interference in 900 MHz point-to-multipoint bands, we will apply them to the new point-to-multipoint bands at 932-932.5/941-941.5 MHz in lieu of the standards set forth in Appendix B of the *Second Report and Order*. The standards adopted in PR Docket No. 87-5 have already been incorporated into Section 94.71 of the Rules, but no standards for transmissions employing digital modulation techniques in 900 MHz point-to-multipoint bands are currently specified in Section 22.106 of the Rules. Therefore, we are taking this opportunity to add the emission limitation standards for transmissions employing digital modulation techniques adopted in PR Docket No. 87-5 to Section 22.106 of the Rules.[27]

ADMINISTRATIVE

46. For the foregoing reasons, IT IS ORDERED that the petitions filed by Motorola, Inc., Utilities Telecommunications Council, Paging Network, Inc., Telocator, and PacTel Paging, Inc. ARE GRANTED to the extent indicated herein, and ARE DENIED in all other respects. IT IS FURTHER ORDERED that the *Motion for Stay Pending Clarification and / or Reconsideration* filed by PacTel Paging, Inc. IS DISMISSED. IT IS FURTHER ORDERED that under the authority contained in 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r), Parts 1, 21, 22, and 94 of the Commission's Rules ARE AMENDED, as specified below, effective **April 30, 1990.** Finally, IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

RULE CHANGES

Part 1 of Title 47 of the Code of Federal Regulation is amended as follows:

PART 1 -- PRACTICE AND PROCEDURE

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.962 is amended by removing paragraph (i).

Part 21 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 21 -- DOMESTIC PUBLIC FIXED RADIO SERVICES

3. The authority citation for Part 21 continues to read as follows:

Authority: Secs. 4 and 303, 48 Stat. 1066, 1082, as amended, 47 U. S. C. 154, 303, unless otherwise noted.

4. Section 21.31 is amended by revising paragraph (f) to read as follows:

Section 21.31 Mutually exclusive applications.

* * * * *

(f) Applicants for the 932.5-935/941.5-944 MHz bands shall select a frequency pair. Applicants for these bands may select an unpaired frequency only upon a showing that spectrum efficiency will not be impaired and that unpaired spectrum is not available in other bands. During the initial filing window, frequency coordination is not required, except that an application for a frequency in the 942-944 MHz band must be coordinated to ensure that it does not affect an existing broadcast auxiliary service licensee. After the initial filing window, an applicant must submit evidence that frequency coordination has been performed with all licensees affected by the application. All frequency coordination must be performed in accordance with Section 21.100(d) of the Commission's Rules. In the event of mutually exclusive applications occurring during the initial filing window for the 932.5-935/941.5-944 MHz bands, applicants shall be given the opportunity to resolve these situations by applying for an alternative frequency pair, if one is available. To the extent that there are no other available frequencies or to the extent that mutually exclusive applications remain after this process is concluded, lotteries shall be conducted for each frequency pair among all remaining mutually exclusive applications, assuming appropriate coordination with existing broadcast auxiliary stations can be concluded, where necessary. In the event of mutually exclusive applications being received for these bands on the same day after the initial filing window has closed and a subsequent filing window opened, lotteries shall be conducted for each frequency pair among all mutually exclusive applications.

Part 22 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 22 -- PUBLIC MOBILE SERVICES

5. The authority citation for Part 22 continues to read as follows:

Authority: 47 U.S.C. 154, 303, unless otherwise amended.

6. Section 22.31 is amended by revising paragraph (g) to read as follows:

Section 22.31 Mutually exclusive applications.

* * * * *

(g) During the initial filing window for frequencies in the 932-932.5/941-941.5 MHz bands, applicants may specify a frequency preference, but the Commission shall assign all frequencies. After the initial filing window, an applicant must select the frequency or frequency pair for which it is applying. With respect to unpaired frequencies, an applicant must specify a frequency in the 932-932.5 MHz band if all planned remote stations are located within 48 kilometers of the control station. In the event of mutually exclusive applications occurring in the 932-932.5/941-941.5 MHz bands during the initial filing window, a nationwide random drawing to rank applications shall be conducted among all applications that have not been dismissed or otherwise found unacceptable. This drawing shall include applications for both paired and unpaired frequencies. In the event mutually exclusive applications are received for the 932-932.5/941-941.5 MHz bands on the same day after the initial filing window has closed and a subsequent filing window opened, lotteries shall be conducted for each frequency or frequency pair among all mutually exclusive applications.

7. Section 22.106 is amended by revising the title and adding new paragraphs (b)(3) and (b)(4) to read as follows:

Section 22.106 Emission limit.

* * * * *

(b)* * *

(b)(3) For those transmitters that operate in the frequency bands 932-932.5/941-941.5 MHz with a 12.5 kHz bandwidth,

(i) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 2.5 kHz up to and including 6.25 kHz: At least 53 $\log_{10}$ (f_d/2.5) decibels;

(ii) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 6.25 kHz up to and including 9.5 kHz: At least 103 $\log_{10}$ (f_d/3.9) decibels;

(iii) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 9.5 kHz up to and including 15 kHz: At least 157 $\log_{10}$ (f_d/5.3) decibels;

(iv) On any frequency removed from the center of the authorized bandwidth by a displacement frequency greater than 15 kHz: At least 50 plus 10 $\log_{10}$(P) or 70 decibels, whichever is the lesser attenuation.

(b)(4) For those transmitters that operate in the frequency bands 932-932.5/941-941.5 MHz with a bandwidth greater than 12.5 kHz,

(i) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 5 kHz up to and including 10 kHz: At least 83 $\log_{10}$ (f_d/5) decibels;

(ii) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (f_d in kHz) of more than 10 kHz up to and including 250 percent of the authorized bandwidth: At least 116 $\log_{10}$ (f_d/6.1) decibels or 50 plus 10$\log_{10}$(P) or 70 decibels, whichever is the lesser attenuation;

(iii) On any frequency removed from the center of the authorized bandwidth by more than 250 percent of the authorized bandwidth: At least 43 plus 10 $\log_{10}$ (output power in watts) decibels or 80 decibels, whichever is the lesser attenuation.

* * * * *

8. Section 22.501 is amended by revising paragraph (g)(1), the introductory portion of paragraph (g)(3), and paragraph (g)(5) to read as follows:

Section 22.501 Frequencies.

* * * * *

(g)(1) The frequencies listed in this paragraph are available to control stations utilized within a multiple address system that requires the use of at least four simultaneously operated remote base stations operated on the same frequency assignment. These frequencies will be assigned only when there are four or more remote sites listed on the application for license. The frequencies may be used in paired or unpaired configurations. When paired, the higher frequency will be used by the control/relay station, and the lower frequency will be used by the control station.

* * * * *

(g)(3) The assignment of frequencies operating in the 932-932.5/ 941-941.5 MHz bands, and the reassignment of frequencies operating in the 928.8625-928.9875/959.8625-959.9875 MHz bands will be governed by the following criteria:

* * * * *

(g)(5) Stations in multiple address systems on the 941-941.5 MHz channels will not be authorized to use effective radiated power exceeding 600 watts. Stations in multiple address systems on the 932-932.5 MHz channels will not be authorized to use effective radiated power exceeding 30 watts.

* * * * *

Part 94 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 94 -- PRIVATE OPERATIONAL - FIXED MICROWAVE SERVICE

9. The authority citation for Part 94 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

10. Section 94.15 is amended by revising the introductory portion of paragraph (b), and paragraph (e), to read as follows:

Section 94.15 Policy governing the assignment of frequencies.

* * * * *

(b) Except as provided in Section 94.25(k), all applications for new or modified stations must contain an engineering analysis of the potential interference between the proposed facilities and previously authorized facilities and pending applications. The application must contain as supplemental information:

* * * * *

(e) Except as provided in paragraph (h) of this section, frequencies will be assigned in pairs for those stations employing full-duplex transmission, with one of the frequencies designated as the station transmit frequency and the other as the receive frequency. Provision is made in some bands for use of both paired and unpaired frequencies for one-way operations. Applicants requesting the use of paired frequencies in the 932-932.5 and 941-941.5 MHz bands for one-way master station transmissions to four or more remote stations will be assigned a frequency in the 932-932.5 MHz band, if available, unless planned remotes are to be located beyond 48 kilometers from the master station. Except for the 932-932.5/941-941.5 MHz bands, assignment of a paired frequency for one-way operations will be made only upon a showing that spectrum efficiency will not be impaired and that unpaired frequencies are not available in other fixed spectrum. However, operation on frequencies not in accordance with the foregoing will be authorized only upon a showing that the interference criteria of this part could not be met or that an exception is required to prevent intrasystem interference.

* * * * *

11. Section 94.25 is amended by adding a new paragraph (k) to read as follows:

Section 94.25 Filing of applications.

* * * * *

(k) Applications for frequencies in the 932-935 and 941-944 MHz bands shall be filed during an initial one-week period, to be specified by Commission public notice. During this initial filing period, applicants must perform frequency coordination only to the extent of

protecting existing grandfathered broadcast auxiliary stations in the 942-944 MHz band. After this initial filing period, applications for the 932-935/941-944 MHz bands will not be accepted until further public notice is given by the Commission. During the initial filing period, applications for frequencies in the 932-932.5 and 941-941.5 MHz bands need not specify the exact frequency, but thereafter must include the specific frequency requested. All applications for frequencies in the 932.5-935 and 941.5-944 MHz bands must specify the frequency requested.

12. Section 94.63 is amended by revising paragraph (a) and paragraph (d)(4)(i), redesignating existing paragraph (d)(4)(ii) as paragraph (d)(4)(iii), and adding a new paragraph (d)(4)(ii) to read as follows:

Section 94.63 Interference protection criteria for operational fixed stations.

(a) Before filing an application for new or modified facilities under this part, the applicant must perform a frequency engineering analysis to assure that the proposed facilities will not cause interference to existing or previously applied-for stations in this service of a magnitude greater than that specified in the criteria set forth in paragraph (b) of this section, unless otherwise agreed to in accordance with Section 94.15(b). As an exception to the above requirement, when the proposed facilities are to be operated in the bands 932-935 MHz, 941-944 MHz, 10,550-10,680 MHz, 17,700-19,700 MHz, 21,200-21,800 MHz, 22,400-23,000 MHz, or 38,600-40,000 MHz (excluding those frequencies set out in Section 94.189), applicants shall follow the prior coordination procedure specified in Section 21.100(d) of this chapter. In addition, when the proposed facilities are to be operated in the bands 2655-2690 MHz, or 12,500-12,700 MHz, applications shall also follow the procedures in Section 21.706(c) and (d) and the technical standards and requirements of Part 25 of this chapter as regards licensees in the Communication-Satellite Service. *See* also Section 94.77.

* * * * *

(d)(4)(i) For multiple address stations in the 928-929/952-960 MHz bands, a statement that the proposed system complies with the following co-channel separations from all existing stations and pending applications:

Fixed-to-fixed . . .	145 Km (90 miles)
Fixed-to-mobile . . .	113 Km (70 miles)
Mobile-to-mobile . . .	81 Km (50 miles)

Multiple address systems employing only remote stations will be treated as mobile for the purposes of determining the appropriate separation. For mobile operation, the mileage is measured from the reference point specified on the license application.

(d)(4)(ii) For multiple address stations in the 932-932.5/941-941.5 MHz bands, a statement that the proposed system complies with the following co-channel separation from all existing stations and pending applications:

Fixed-to-fixed . . .	113 Km (70 miles)

* * * * *

13. Section 94.73 is amended by removing the figures for maximum allowable transmitter power in the 932-932.5 MHz and 941-941.5 MHz bands to read as follows:

Section 94.73 Power limitations.

* * * * *

(a) * * *

Frequency Band (MHz)	Maximum allowable transmitter power		Maximum allowable EIRP 2/	
	Fixed (W)	Mobile (W)	Fixed (dBW)	Mobile (dBW)
* * * * *				
932-932.5	. . .	. . .	+17	. . .
* * * * *				
941-941.5	. . .	. . .	+30	. . .
* * * * *				

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See First Report and Order*, GEN Docket No. 82-243, adopted November 21, 1984, 50 FR 4650 (1985).

[2] *See Third Notice of Proposed Rule Making*, GEN Docket No. 82-243, adopted November 25, 1986, 2 FCC Rcd 1608 (1987).

[3] *See Second Report and Order*, GEN Docket No. 82-243, adopted February 9, 1989, 4 FCC Rcd 2012 (1989). Two *Erratums* have also been issued to the *Second Report and Order*. *See Erratum*, GEN Docket No. 82-243, released April 17, 1989, 4 FCC Rcd 3585 (1989), and *Second Erratum*, GEN Docket No. 82-243, released June 2, 1989, 4 FCC Rcd 4630 (1989).

[4] PacTel also filed a *Motion For Stay Pending Clarification and/or Reconsideration*. The Commission did not act upon this motion since the 932-935/941-944 MHz bands could not be used pending issuance of a public notice soliciting applications to operate in this band. We intend to issue this Public Notice in the near future, and are dismissing PacTel's Motion as moot.

[5] Replies were due on June 15, 1989. PacTel filed a *Request for Extension of Time* on June 14, explaining that shortly before the filing deadline, counsel for PacTel became aware of a potential

conflict of interest problem stemming from its representation of API in another matter. By June 20, this conflict had been resolved, and PacTel filed its Reply on that date. Due to the unusual circumstances surrounding Pactel's Reply, and the fact that we believe that acceptance of its Reply does not cause harm to any other party to this proceeding, we have accepted and considered PacTel's Reply in arriving at our decision herein.

[6] *See Report and Order*, CC Docket No. 86-128, 2 FCC Rcd 5713 (1987); *Third Report and Order*, GEN Docket No. 82-334, 2 FCC Rcd 1050 (1987); *First Report and Order*, GEN Docket No. 82-334, 48 FR 50722 (1984).

[7] We recognize that an adjacent channel interference problem could occur at the band edges between point-to-multipoint and point-to-point channels at 932.5 MHz and 941.5 MHz. We further recognize the possibility of adjacent channel interference developing among point-to-multipoint licensees because of the use of new digital equipment. We intend to monitor these situations carefully once licensing has begun and take any appropriate action that may be necessary to correct such interference.

[8] *See Report and Order*, GEN Docket No. 82-335, 50 FR 4655 (1985).

[9] Part 22 of the Commission's Rules uses the term "control" to describe the higher power frequency in a point-to-multipoint pair, whereas Part 94 uses the term "master".

[10] NTIA has also informally expressed support for grouping the applications.

[11] *See* 47 CFR Section 22.501(g)(3)(i).

[12] *See* 47 CFR Section 94.63(d)(4)(i).

[13] Applications may be excluded from the ranking if the Commission finds that the applicant is unqualified or if the application is not properly filed.

[14] For example, if the first number drawn is 100, application number 100 will be ranked highest. If the second number drawn is 50, application number 50 will be ranked second highest, etc.

[15] We note that several channels are available in each point-to-point channel group. Specifically, there are fourteen 25 kHz channel pairs, three 50 kHz pairs, six 100 kHz pairs, and seven 200 kHz pairs.

[16] However, we note that there is currently no coordination agreement with Canada for the use of frequencies in the 932-935 MHz and 941-942 MHz bands by other than certain radars. Therefore, the utilization of 932-935/941-942 MHz for point-to-multipoint and point-to-point fixed operations along the U.S.-Canada border may be subject to harmful interference from, or may cause harmful interference to, Canadian assignments in these bands. The United States is currently attempting to coordinate with Canada regarding fixed service use of the bands 932-935/941-942 MHz. Until such time as an agreement may be reached, stations on frequencies in the 932-935/941-942 MHz bands within 35 miles of the U.S.-Canada border may operate subject to causing no harmful interference to Canadian operations. Additionally, United States operations in these areas may be subject to harmful interference caused by Canadian operations. At such time as an agreement is reached, United States operations along the border may be subject to modification. Similarly, there is no coordination agreement with Mexico in the bands 932-935/941-944 MHz. Successful applicants in either border area take their channels subject to the terms of possible eventual international agreements.

[17] We reserve the option to use a nationwide lottery for the point-to-multipoint applications again if we receive a substantial number of applications for the remaining channels on the first day we begin to accept applications after the one-week filing window.

[18] *See Second Report and Order*, *supra*, at para. 28.

[19] Neither PageNet nor Telocator filed comments to the *Third Notice*. PacTel's predecessor company, Gencom Incorporated, did file a joint comment with Omni Communications, Inc. However, this comment recommended that a paired band be set aside exclusively for common carrier paging control purposes and did not focus on the merits of one-way versus two-way use of the bands.

[20] We will require, however, such a showing for one-way channel use in the point-to-point bands.

[21] Applicants that have single channel requirements and that do not plan to communicate with remotes farther than 48 kilometers from the master station may submit a demonstration to support a request for a higher power 941 MHz channel. If these demonstrations are convincing, we will assign the applicant the higher power 941 MHz channel; otherwise, the applicant will be treated like all other applicants and assigned a lower power 932 MHz channel.

[22] We note that Section 94.3 requires that remote stations for multiple address systems must be scattered over the service area in such a way that more than two point-to-point systems would be needed to serve those remotes.

[23] *See Second Report and Order*, *supra*, at para 27.

[24] *See* 47 CFR Section 22.501.

[25] *See Second Report and Order*, *supra*, at para. 17.

[26] *Id.*, at para. 18.

[27] Because the same equipment is likely to be used in both services and these standards have already been adopted for the private radio licensees, application of these standards to common carrier licensees will not be controversial. Accordingly, we find that good cause exists for also adopting these standards for Part 22 common carrier licensees without prior notice and comment. *See* 5 U.S.C. Section 553 (b)(B).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

LAS AMERICAS COMMUNICATIONS, INC. Newark, New Jersey	**MM Docket No. 84-115** File No. BPH-821105AR
Frances Lawrence Antonin and Mary Garcia d/b/a ANTONIN & GARCIA Jersey City, New Jersey	**MM DOCKET NO. 84-123** File No. BPH-821108AQ
CAPRICE BROADCASTING GROUP, INC. Newark, New Jersey	**MM DOCKET NO. 84-125** File No. BPH-821108AS
COMSERV BROADCASTING GROUP, INC. Newark, New Jersey	**MM DOCKET NO. 84-128** File No. BPH-821108AV
MULTICULTURAL BROADCASTING, INC. Newark, New Jersey	**MM DOCKET NO. 84-131** File No. BPH-821108BE
OMNILINGUAL BROADCASTING, INC. Newark, New Jersey	**MM DOCKET NO. 84-137** File No. BPH-821108BK
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: February 26, 1990; Released: March 14, 1990

By the Commission: Commissioner Quello concurring; Commissioner Marshall not participating.

1. On April 28, 1989, the applicants reached a settlement agreement whereby Las Americas would amend its application for a new FM station on channel 290A to specify Jersey City as its community of license, its amended application would be granted and the five competing applications would be dismissed. Now before the Commission are: (a) Joint Petition for Approval of Settlement Agreements and Grant of Las Americas' Application, filed on April 28, 1989, by Las Americas Communications, Inc., Antonin & Garcia, Caprice Broadcasting Group, Inc., Comserv Broadcast Group, Inc., Multicultural Broadcasting, Inc., and Omnilingual Broadcasting, Inc.;[1] (b) a Petition for Leave to Amend, filed on April 28, 1989, by Las Americas; (c) a Petition for Leave to Intervene, filed on May 11, 1989, by Global Broadcasting Group;[2] (d) Advice of Withdrawal from Joint Petition, filed May 25, 1989, by Omnilingual Broadcasting, Inc.;[3] (e) Supplement to Joint Petition for Approval of Settlement Agreements and Grant of Las Americas' Application, filed on November 9, 1989;[4] (f) a Request for Expedited Relief, filed on February 2, 1990, by Las Americas;[5] (g) Petition for Leave to Intervene, filed February 5, 1990, by Coalition of Concerned Newark Citizens;[6] and (h) Opposition to Petition for Leave to Amend and to Joint Petition for Approval of Settlement Agreement, filed February 5, 1990, by Coalition of Concerned Newark Citizens. We also note the filing of, and have given appropriate consideration to, a Resolution adopted December 6, 1989 by the Newark Municipal Council, as well as letters from New Jersey Congressman Payne and various Newark community leaders, all of which were served on the parties. They object to the proposed settlement agreement because it entails reassigning FM Channel 290A, currently occupied by Station WNWK-FM, from Newark to Jersey City. For the reasons that follow, we find that the amendment is supported by good cause and that approval of the settlement agreement will serve the public interest by terminating this proceeding and expediting first local transmission service to Jersey City.[7]

I. BACKGROUND

2. This proceeding arose when the Commission refused to renew the license for Station WHBI-FM on FM Channel 290A at Newark, New Jersey.[8] After its decision not to renew the license for Station WHBI-FM became final, the Commission announced that it would accept applications for interim authority to operate on the deleted facilities of WHBI-FM pending selection of a regular licensee. *Public Notice*, Mimeo No. 1969 (Feb. 3, 1982). Based on its comparative evaluation of the interim applicants, the Commission ultimately selected Global Broadcasting Group, Inc. to serve as interim operator pending completion of proceedings to select a new licensee for the deleted facilities of Station WHBI-FM.[9]

3. FM Channel 290A is assigned to Newark, New Jersey. *See* 47 C.F.R. § 73.202(b). Five of the remaining applications for regular authority to construct and operate a new station on FM Channel 290A specified Newark as their proposed community of license. Only one applicant, Antonin & Garcia, proposed to serve Jersey City pursuant to Section 73.203, 47 C.F.R. § 73.203, then in effect, permitting applicants to specify any community within fifteen miles of the community listed on the Table of Assignments. Although the Administrative Law Judge initially awarded Antonin & Garcia a dispositive preference under Section 307(b) of the Communications Act, 47 U.S.C. § 307(b), for its proposal to bring first local transmission service to Jersey City, he subsequently found, and the Board agreed, that Antonin & Garcia is unqualified on character grounds.[10]

4. All five of the losing applicants, including the Jersey City applicant, filed applications for review of the Review Board's Decision, which concluded that Las Americas was the comparatively superior applicant.[11] Applications for review were also filed by Jersey City Broadcasting Company and by Metrolina Media, Inc.[12] In addition, The Committee to Preserve Multi-Ethnic and Multi-Lingual

Programming (The Committee) filed a Contingent Application for Review.[13] Finally, Memphis Telecasters, Ltd. sought to file an *amicus* brief on the financial certification issue. Neither Jersey City Broadcasting, Metrolina Media, The Committee, nor Memphis Telecasters is a party to this proceeding.[14]

II. PETITIONS FOR LEAVE TO INTERVENE

5. Global Broadcasting Group, the interim operator on WHBI in Newark, and Coalition, a group of Newark residents, seek leave to intervene in this proceeding so that they may object to the proposed settlement, whereby Las Americas would be awarded a construction permit to build and operate a station on FM channel 290A in Jersey City. For the reasons that follow, we will not permit either Global or Coalition to intervene in this proceeding. Nevertheless, in view of the importance of the issues raised, we will, as an exercise of our discretion, consider their arguments on our own motion.

6. *Global Broadcasting Group:* Before the Commission acted on the pending applications for review, Las Americas reached separate settlement agreements with each of the other five applicants providing that they would dismiss their pending applications in exchange for monetary payments from Las Americas. On May 11, 1989, Global, the interim operator on Station WHBI in Newark, filed a Petition for Leave to Intervene.

7. Section 1.223(c) of the Commission's rules, 47 C.F.R. § 1.223, specifies that any person seeking to intervene more than thirty days after publication of the Hearing Designation Order must demonstrate (1) petitioner's interest in the proceeding; (2) how such participation will assist the Commission in the determination of the issues in question; and (3) why it was not possible for petitioner to participate within thirty days of the Hearing Designation Order. While its status as the interim operator may give Global an interest in issues raised by the settlement, it has not explained why it could not participate in an earlier stage of this proceeding, or how its participation will assist the Commission in resolving the questions before it. It offers no factual information pertinent to the issues at hand.

8. Nor are we persuaded that there is any other basis for Global's intervention. When the Commission announced its intention to select an interim operator, it stated that it would not accept applications "which include[d] any party who has or will have any employment or ownership interest in any application for a construction permit to use the frequency occupied by Station WHBI on a regularly licensed basis." *Newark Radio*, 763 F.2d at 452, quoting *Public Notice* at 1. Thus, Global is not a potential applicant with standing to oppose the settlement agreement under *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, No. 87-1285 (D.C. Cir. Jan. 12, 1990).

9. However, Global argues that the Commission should modify this restriction in light of its 1988 decision in *Rebecca Radio of Marco*, 4 FCC Rcd 830 (1988), permitting third-party participation in settlement agreements among competing applicants. Global's reliance on *Rebecca Radio* is misplaced. The Commission has reversed its initial approval of the third-party agreement in that case. *Rebecca Radio*, FCC 90-67 (Feb. 8, 1990). Moreover, the 1988 decision did not change long-standing precedent that a settlement agreement is a purely private contractual agreement over which the Commission has only limited control, and that no one who is not a party to a proposed settlement agreement has the right to participate in such an agreement, or to prevent others from settling this case.[15] Thus, even if Global were an applicant for the permanent license, it would not have a right to be included in, or to bar other applicants from entering into, a settlement agreement.

10. *Coalition of Concerned Newark Citizens:* Coalition is an unincorporated group of Newark residents that objects to Las Americas' proposed move to Jersey City. It therefore seeks leave to intervene in this proceeding so that it may oppose the proposed settlement of this case. As it is comprised of Newark residents, Coalition may have an interest, as Section 1.223(c) of the Rules requires, in whether the Commission approves a settlement agreement under which FM channel 290A would be "reassigned" to Jersey City. In this respect Coalition arguably satisfies the first prong of the test for intervention under Section 1.223(c), but it fails to explain why it could not participate in an earlier stage of this proceeding, or how its participation will assist the Commission in resolving the questions before it.[16]

11. Notwithstanding Coalition's contention, Las Americas' proposed move to Jersey City does not inject a new issue into this case that warrants permitting Coalition to intervene at this late stage of this case. Faced with competing applications for 290A in Jersey City and Newark, the Commission specified a section 307(b) issue when it designated this case for hearing. As explained more fully below, the appropriate time for interested citizens to participate in the section 307(b) issue was during the hearing on that specified issue. In view of the pending applications for review, neither the grant of Las Americas' Newark application nor the disqualification of the Jersey City applicant on character grounds is final. Grant of Antonin & Garcia's still pending application for Jersey City would result in 290A being reallocated to that community. Therefore, Las Americas' proposed move to Jersey City does not require that Newark residents be afforded an additional chance to participate. Moreover, Coalition offers no factual information pertinent to the issues at hand.[17]

12. Nor does Coalition have standing to intervene pursuant to *Coalition for the Preservation of Hispanic Broadcasting v. FCC*, No. 87-1285 (D.C. Cir. Jan. 12, 1990). Coalition did not seek Commission authorization to provide service on FM channel 290A and attempted to intervene only after a settlement was proposed. Even then, Coalition did not allege that it had standing as a "prospective competitor." These factors distinguish Coalition from the appellants *Coalition for the Preservation of Hispanic Broadcasting*.

III. SETTLEMENT AGREEMENT

13. The proposed settlement agreement contemplates that Las Americas will amend its application to specify Jersey City as its community of license, that its amended application will be granted, and that the other five applicants will voluntarily dismiss their applications in exchange for monetary payments. As consideration for dismissing their respective applications, Las Americas initially proposed to pay $2,700,000 to Comserv; $2,350,000 to Multicultural; $1,000,000 to Antonin & Garcia; $220,000 to Caprice; and $200,000 to Omnilingual. By

virtue of a further agreement between Las Americas, Omnilingual, and Caprice, filed on November 9, 1989. Las Americas now proposes to pay $376,000 to both Caprice and to Omnilingual. In addition, Las Americas will assume Antonin & Garcia's obligations to Jersey City Broadcasting and two other applicants for Jersey City that voluntarily dismissed their applications pursuant to an earlier settlement agreement among Antonin & Garcia and the other Jersey City applicants.

14. In order to approve the proposed settlement agreements under Section 311(c) of the Communications Act, 47 U.S.C. § 311(c), governing settlement agreements in initial licensing proceedings, we must find that the agreements are consistent with the public interest, convenience or necessity, and that none of the parties to the agreements filed its application for the purpose of reaching or carrying out such an agreement. Pursuant to the requirements of Section 73.3525 of the Rules, 47 C.F.R. § 73.3525, the parties have submitted copies of the settlement agreements between Las Americas and each of the dismissing applicants and a declaration under penalty of perjury from each party to the settlement agreements. The parties' declarations certify that their respective applications were not filed for the purpose of reaching or carrying out a settlement agreement, and that approval of the settlement agreements will serve the public interest by conserving the resources of the Commission and the parties, and by expediting the initiation of first local transmission service to Jersey City.[18]

15. Strong public interest considerations support approval of the settlement agreement, which is endorsed by the Mass Media Bureau.[19] As the Bureau contends, the proposed settlement offers the best possible resolution of this case, in terms of the public interest, because it proposes that the applicant determined to be comparatively superior by the Review Board will obtain a construction permit for the community deemed to be preferred under Section 307(b) by the ALJ.

16. When the Commission designated this proceeding for hearing, it specified an issue to determine whether Newark (the community listed on the Table of Assignments) or Jersey City has the greater need for service under Section 307(b). Under the settlement agreement, Las Americas will pay Antonin & Garcia to dismiss its Jersey City application in return for compensation from Las Americas. In view of the unresolved Section 307(b) issue, we must determine, pursuant to Section 73.3525(b) of the Rules,[20] whether the proposed dismissal of the only remaining Jersey City application has Section 307(b) consequences requiring republication of the availability of FM channel 290A in that community. If we concluded that dismissal of Antonin & Garcia's application would "unduly impede achievement of a fair, efficient and equitable distribution of radio service," we would have to afford further opportunity for other persons to apply for that channel in Jersey City before we could act on the proposed settlement.

17. In our view, the proposed withdrawal of Antonin & Garcia does not entail Section 307(b) consequences requiring republication under Section 73.3525(b)(2) of the Commission's rules. Las Americas proposes to amend its application to specify Jersey City, rather than Newark, as its proposed community of license.[21] We find, for the reasons set forth below, that the proposed amendment is supported by good cause, and that its acceptance will serve the public interest. In view of this amendment, there is no need for us to require republication of the availability of channel 290A in Jersey City. In accordance with the ALJ's finding that Jersey City's need for first local transmission service is greater than Newark's need for a sixth broadcast outlet, Las Americas' proposed move to Jersey City adequately protects that community's need for broadcast service.[22]

18. Global and Coalition argue, however, that Las Americas may not have FM channel 290A, which is currently assigned to Newark only, reassigned to Jersey City without initiating a Rule Making proceeding, in which all interested members of the public would have an opportunity to comment. As Global and Coalition note, the Commission has abolished Section 73.203, 47 C.F.R. § 73.203, under which Antonin & Garcia specified Jersey City (rather than Newark) as its proposed community of license. *The Suburban Community Policy, the Berwick Doctrine, and the De Facto Reallocation Policy*, 93 FCC 2d 436 (1983), recon. denied, 56 RR 2d 835 (1984). However, as a matter of fairness to applicants already on file when the Commission abolished the fifteen mile rule and to further its Section 307(b) objectives, the Commission amended Section 73.203 prospectively rather than retroactively. 93 FCC 2d at 458 ¶ 42; 56 RR 2d at 838 ¶ 12. Because the Commission did not amend its rules to require a Rule Making proceeding until after the applications in this proceeding were filed, the Newark applicants were not entitled to have the one applicant for Jersey City dismissed when the Commission abolished its fifteen mile rule. By the same token, the pendency of this adjudicatory proceeding when the rule was changed precluded an individual seeking to serve Jersey City from initiating a Rule Making proceeding to have channel 290A reassigned to Jersey City while this ongoing adjudicatory proceeding is pending. Thus, we will process all the applications in this case as if the old Section 73.203, which permitted applicants to specify any community within fifteen miles of the community listed on the Table of Assignments, was still in effect.

19. In doing so, we recognize that it was Antonin & Garcia (and not Las Americas) that originally filed for the unlisted community of Jersey City. In our view, this does not, as Global and Coalition suggest, preclude Las Americas from amending to specify Jersey City. By making the deletion of the fifteen mile rule prospective, the Commission sought to preserve its opportunity to consider the needs of an unlisted community in the context of an ongoing adjudicatory proceeding. 56 RR 2d at 838 ¶ 12. This objective would be defeated if we were to rule that only those applicants originally filing for Jersey City could take advantage of the prior version of the rule. Such a ruling would deprive the Commission of its opportunity to consider the needs of the community of Jersey City for broadcast service in the context of this adjudicatory proceeding. In this regard, the Commission made the amendment to Section 73.203 prospective rather than retroactive precisely so that it would have such flexibility in an ongoing adjudicatory proceeding.

20. Nor is there merit to the contention that, because there has been no final determination that Jersey City is the preferred community under Section 307(b), a Rule Making is warranted to afford Newark residents an opportunity to comment on the proposed reassignment of channel 290A to Jersey City. In 1984, when the Commission designated for hearing the various applications for channel 290A proposing to serve either Newark or Jersey

City, local public notice of the hearing was provided, pursuant to 47 C.F.R. § 73.3594. Any person had a right to appear and testify at the hearing on the Section 307(b) issue. *See* 47 C.F.R. § 1.225. Despite its disqualification on character grounds, Antonin & Garcia continued to prosecute its Jersey City application. Had the Commission concluded, in the context of this adjudicatory proceeding, that Antonin & Garcia is basically qualified and that Jersey City is the preferred community under Section 307(b), it would have granted Antonin & Garcia's application for Jersey City. In this manner, Channel 290A would have been "reassigned" to Jersey City, without creating an additional opportunity for public comment on this "reassignment". We therefore find that Las Americas is not required to engage in a Rule Making proceeding in order to specify Jersey City as its community of license.

IV. PETITION FOR LEAVE TO AMEND

21. In order to facilitate the settlement agreement, Las Americas seeks to amend its application to reflect a minor stock realignment and to change its city of license from Newark to Jersey City. We find that the amendment is supported by good cause, and that its acceptance will serve the public interest by ending this protracted comparative proceeding and expediting service to Jersey City, which has no local transmission service.

22. In its Opposition to Las Americas' Petition for Leave to Amend, Global submits that, even if a Rule Making is not required to effect a change in the city of license, this amendment constitutes a major change under 47 C.F.R. § 73.3573(b) of the Commission's rules, and that Las Americas has not demonstrated good cause for its voluntary decision to change its city of license, as 47 C.F.R. § 73.3522(b) of the rules requires. Although Las Americas' proposal to change its city of license constitutes a major change within the meaning of Section 73.3573(b), it is well established that Section 73.3573(b) applies only to amendments filed prior to designation and that Section 73.3522(b) governs the acceptance of post-designation amendments.[23]

23. Section 73.3522(b) of the Commission's rules requires that post-designation amendments be supported by good cause. In order to establish good cause for a post-designation amendment the moving party generally must show that it acted with due diligence, that the amendment was not required by a voluntary act of the applicant, that the amendment will not require the addition of parties or the enlargement of issues, that the amendment will not disrupt the hearing, that the other parties will not be unfairly prejudiced, and that the applicant will not gain a comparative advantage if the amendment is accepted. *California Broadcasting Corp.*, 90 FCC 2d 800, 808 ¶ 17 & n.28 (1982), citing *Erwin O' Conner Broadcasting Co.*, 22 FCC 2d 140, 143 ¶ 7 (Rev. Bd. 1970).

24. Strictly speaking Las Americas' amendment does not meet all the factors for good cause under *O' Conner*. Nevertheless, in accordance with the requirements of *O' Conner*, the parties diligently sought to settle this proceeding and expeditiously filed the Joint Request as soon as a settlement agreement had been reached. Moreover, the settlement agreement terminates, rather than disrupts, this adjudicatory proceeding. Under these circumstances, accepting the amendment will not result in the addition of any new parties. And, as explained below, we reject Global's claims that the amendment requires the addition of real- party-in-interest and cross-interest issues against Las Americas. Concededly, as Global contends, Las Americas' decision to change its community of license is clearly not involuntary. Rather, Las Americas, by its own admission, seeks to amend its application to change its city of license in order to eliminate the need for republication under Section 73.3525(b).

25. That the proposed change to Jersey City is voluntary is not fatal to accepting Las Americas' amendment under Commission precedent. As we have long recognized, the primary purpose of Section 73.3522(b) is to prevent undue disruption of the Commission's administrative processes. *Gross Broadcasting Co.*, 46 RR 2d 1091, 1097-98 ¶ 38 (1979). Accordingly, the *O' Conner* test for good cause is not rigidly applied, but interpreted with this overriding objective in mind. Where a post-designation amendment permits the immediate grant of a pending application, either by facilitating a settlement agreement or by curing a disqualifying defect in the only pending application, the Commission generally concludes that the equities favor accepting the amendment.[24] We see no circumstances that militate against allowing Las Americas to change its community of license.

26. Notwithstanding Global's further claim, the Commission decision in *Beaufort County* does not require the rejection of Las Americas' amendment. In that case competing applicants for a station on FM Channel 259C proposed to serve different communities, and the Commission specified a Section 307(b) as well as the standard comparative issue. Following the Initial Decision, which determined that Barnacle was the preferred community under Section 307(b), the applicant for Beaufort tried to amend its application to specify Barnacle, instead of Beaufort. In the face of an unfavorable initial decision, the Review Board refused to allow such "an opportunistic switch in station location . . . in a comparative case where a competing applicant would be prejudiced by such action."[25] Here, however, all remaining applicants have joined in the settlement agreement. Therefore, there is no competing applicant that would be prejudiced by the proposed change to Jersey City. Moreover, Las Americas, unlike the applicant for Beaufort, seeks to change its city of license, not after an unfavorable decision denying its application on Section 307(b) grounds, as was the case in *Beaufort County*, but after a Review Board Decision *granting* its application for Newark on comparative grounds. Thus, we find that Global's reliance on *Beaufort County* is misplaced.

27. In addition to changing its community of license, Las Americas' amendment also reflects certain minor ownership changes that do not effect a transfer of control of the applicant. Conditioned upon Commission approval of the settlement agreement, Las Americas proposes that Raphael Diaz, Dolores Vera, and Laurence Bernard will become stockholders with a combined ownership interest of 24 percent; that the ownership interest of Las Americas' 63 percent stockholder, Luis Raul Bernard will not change; and that the stock interest of stockholders Luis Rodriguez, Melba Falu, Georgina Falu, and Carlos Knauth will be reduced. Proposed 15 percent stockholder Raphael Diaz has agreed to pledge personal assets to secure a loan from the Midlantic National Bank, the proceeds of which will be used to meet Las Americas' financial obligations to the dismissing applicants under the settlement agreement. Diaz will also serve as vice president and director of Las Americas.

28. Global argues that these changes warrant the addition of real-party-in-interest and cross-ownership issues against Las Americas. We find no basis for adding either a cross-ownership or real-party-in-interest issue against Las Americas. To support its request for a real-party-in-interest issue, Global notes that Las Americas is not relying on any personal financing from its controlling stockholder, Raul Bernard, whose 63 percent interest remains unchanged after the amendment. Based on the disparity between Bernard's interest and that of Diaz, whose role in securing the loan from Midlantic is critical to the settlement agreement, Global surmises that Diaz must be a real-party-in-interest behind Las Americas. The contention that Diaz is a real-party-in-interest is not based on specific allegation of facts, as required by 47 C.F.R. § 1.229(d) governing requests to enlarge issues, but upon pure speculation and surmise.

29. Global also relies on an affidavit from Global's principal, Stephen LeBow, reporting a conversation between LeBow and one of the Las Americas stockholders whose interest will be reduced after the amendment. According to LeBow, this stockholder was unaware of the proposed settlement and of the anticipated dilution of his interest. Given this nondisclosure and uneven dilution of stock adjustments reported in the amendment, Global claims that the ownership changes are, in effect, a sham and that Diaz will have a controlling interest. However, LeBow's affidavit is pure hearsay, and unsupported by reliable evidence that Las Americas' stockholders were actually unaware of the diminution of their stock interests. No issue is warranted under Section 1.229(d) which requires that factual allegations be supported by affidavits from persons having personal knowledge of the facts.

30. Nor does the amendment warrant the addition of a cross-interest issue against Las Americas. As Diaz is an officer, director, and 50 percent owner of the proposed assignee of WNJR-AM in Newark, grant of Las Americas' amended application for Jersey City will give Diaz interests in radio stations licensed to serve Newark and nearby Jersey City. Although these interests are attributable under the multiple ownership rules, those rules do not preclude Diaz from having an interest in an AM station and an FM station licensed to serve the same market. *See* 47 C.F.R. § 73.3555(b). The Commission, having concluded that its multiple ownership rules "have superceded the cross-interest policy in several respects," eliminated its cross-interest policy except as applied to joint relationships, key employee relationships, and non-attributable equity interests, none of which applies in this case. *Reexamination of the Commission's Cross - Interest Policy*, 4 FCC Rcd 2208, 2213 ¶ 32 (1989). Notwithstanding Global's contention that Diaz's interests contravene the Commission's cross-ownership policy, that policy addresses only "meaningful interests" that are not attributable under the Commission's multiple ownership rules. As Diaz's interests are attributable, the cross-interest policy does not apply here.

31. One final matter warrants brief comment. Section 73.3526 requires that broadcast applicants maintain a local file to be available for public inspection. Under the rule, the local public file must contain any amendment to, or proposed amendment to, the application. In Opposition to the Joint Petition for Leave to Amend, Coalition submits an affidavit from E. Glenn Clendening, who avers that he was unable to locate Las Americas' file. Based upon the fact that no one at the published location of the file had heard of Las Americas or of its public file, Coalition surmises that Las Americas is guilty of misrepresentation and that its disqualification is warranted. However, the misrepresentation allegation is based solely on surmise and speculation and is not supported by any evidence raising a substantial and material question of fact as required by Section 309 of the Act and Section 1.229 of the Rules. And, in the absence of material misrepresentation to the Commission or other misconduct, a violation of Section 73.3526 would not be potentially disqualifying.[26] Thus, the alleged violation of the local public file rule does not, as Coalition urges, require that we remand this proceeding for further hearings before approving the settlement agreement.

V. ORDERS

32. ACCORDINGLY, IT IS ORDERED, That the Petitions for Leave to Intervene, filed on May 11, 1989, by Global Broadcasting Group, and on February 5, 1990 by Coalition of Concerned Newark Citizens ARE DENIED; and that the pleadings filed by Global and by Coalition ARE DISMISSED.

33. IT IS FURTHER ORDERED, That the Petition for Leave to Amend, filed on April 28, 1989, by Las Americas IS GRANTED; the attached amendment IS ACCEPTED; and that Las Americas' application (File No. BPH-821105AR) IS AMENDED to specify Jersey City, New Jersey as its community of license.

34. IT IS FURTHER ORDERED, That the Joint Petition for Approval of Settlement Agreements and Grant of Las Americas' Application, filed on April 28, 1989 by Las Americas Communications, Inc., Antonin & Garcia, Caprice Broadcasting Group, Inc., Comserv Broadcast Group, Inc., Multicultural Broadcasting, Inc., and Omnilingual Broadcasting, Inc., and amended on November 9, 1989 by Las Americas, Caprice, and Omnilingual IS GRANTED; the attached settlement agreements ARE APPROVED; the amended application filed by Las Americas (File No. BPH-821105AR) IS GRANTED, and the applications filed by Antonin & Garcia (File No. BPH-821108AQ), Caprice Broadcasting Group, Inc. (File No. BPH-821108AS), Comserv Broadcasting Group, Inc. (File No. BPH-821108AV), Multicultural Broadcasting, Inc. (File No. BPH-821108BE), Omnilingual Broadcasting, Inc. (File No. BPH-821108BK), ARE DISMISSED; and the Request for Expedited Relief, filed on February 2, 1990, by Las Americas IS DISMISSED as moot.

35. IT IS FURTHER ORDERED, That the following pleadings ARE DISMISSED as moot: (a) Applications for Review, filed on April 15, 1987 by Antonin & Garcia, Multicultural Broadcasting, Inc., Caprice Broadcasting Group, Inc., Comserv Broadcasting Group, Inc., and Metrolina Media, Inc.; (b) Application for Review, filed on April 16, 1987 by Omnilingual Broadcasting, Inc.; (c) Application for Review, filed on December 29, 1986 by Jersey City Broadcasting Company; (d) Contingent Application for Review, filed on January 16, 1987 by The Committee to Preserve Multi-Ethnic and Multi-Lingual Programming; (e) Petition To Accept *Amicus* Brief, filed November 25, 1987 by Memphis Telecasters, Ltd.; (f) a Statement Pursuant To Section 1.65, filed June 23, 1988 by Comserv; and (g) Petition for Leave to File Information Statement, filed on May 21, 1987 by Multicultural.

36. IT IS FURTHER ORDERED, That the adjudicatory proceeding in MM Dockets 84-115, 84-123, 84-125, 84-128, 84-131, and 84-137 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Addenda to the Joint Petition were filed on May 1, 1989, on May 3, 1989, and on May 8, 1989. Comments were filed on May 10, 1989, by The Committee to Preserve Multi-Ethnic and Multi-Lingual Programming filed Comments on the Joint Petition, and on May 19, 1989, by the Mass Media Bureau. Global Broadcasting Group filed an Opposition to the Joint Petition on May 11, 1989, and Las Americas filed a Reply to Global's Opposition on May 24, 1989.

[2] On May 19, 1989, the Mass Media Bureau filed an Opposition to Global's Petition for Leave to Intervene. Las America's Reply to Opposition to Joint Petition for Approval Of Settlement Agreement, filed on May 24, 1989, recites that it supports the Bureau's opposition. Global filed a Reply on June 1, 1989.

[3] Las Americas filed a Response to the Advice of Omnilingual on June 2, 1989, and Omnilingual filed an Informational Statement on June 27, 1989. Also before the Commission is a Notice of Withdrawal of Counsel, filed May 24, 1989, by the law firm of Tierney & Swift.

[4] Comments on Supplement to Joint Petition for Approval of Settlement Agreements and Grant of Las Americas Application were filed on November 21, 1989, and on November 28, 1989, by Global and by the Mass Media Bureau, respectively.

[5] On February 12, 1990, Global Broadcasting Group filed a Response to Request for Expedited Action, and on February 23, 1990, Coalition filed Comments Regarding Request for Expedited Action.

[6] On February 14, 1990, the Mass Media Bureau filed an Opposition to Coalition's Petition for Leave to Intervene.

[7] Also before the Commission are (a) eight Applications for Review of the Review Board's Decision, *Las Americas Communications, Inc.*, 1 FCC Rcd 786 (Rev. Bd. 1986), motion to enlarge issues denied, 2 FCC Rcd 1614 (Rev. Bd. 1987), granting the application filed by Las Americas; (b) a Petition to Accept *Amicus* Brief, filed November 25, 1987, by Memphis Telecasters, Ltd.; (c) Statement Pursuant to Section 1.65, filed June 23, 1988, by Comserv; and (d) Petition for Leave to File Information Statement, filed on May 21, 1987, by Multicultural. In view of our action herein approving the settlement agreement, we will dismiss these pleadings as moot.

[8] *Cosmopolitan Broadcasting Corp.*, 75 FCC 2d 423, recon. denied, 79 FCC 2d 16 (1980), aff'd per curiam, Order No. 80-1902 (D.C. Cir. June 29, 1981), cert. denied, 454 U.S. 1143 (1982).

[9] *Global Broadcasting Group, Inc.*, 94 FCC 2d 809 (1983), recon. denied, FCC 183-494 (Oct. 28, 1983), aff'd sub nom. *Newark Radio Broadcasting Association v. FCC*, 763 F.2d 450 (D.C. Cir. 1985).

[10] *Las Americas Communications, Inc.*, 101 FCC 2d 736, 760-61 ¶¶ 6-10 (ALJ 1984), remanded for further hearings, 101 FCC 2d 728 (Rev. Bd. 1985), *Supplemental Initial Decision*, 86D-11 (released Feb. 20, 1986), affirmed in part, 1 FCC Rcd 786 (Rev. Bd. 1986), motion to enlarge denied, 2 FCC Rcd 1614 (Rev. Bd. 1987).

[11] Antonin & Garcia filed its Application for Review on April 15, 1987, and an Errata thereto on April 23, 1987. On April 30, 1987, Comserv and Las Americas filed Oppositions to Antonin & Garcia's Application for Review; Comserv and Las Americas filed an Opposition to Caprice's April 15, 1987 Application for Review; Las Americas filed an Opposition to Comserv's April 15, 1987 Application for Review; and Las Americas and Comserv filed Oppositions to Multicultural's April 15, 1987 Application for Review. Las Americas and Comserv filed Oppositions to Omnilingual's April 16, 1987's Application for Review on April 28, and April 30, 1987, respectively.

[12] Oppositions to JCBC's Application for Review were filed by Antonin & Garcia and by Comserv on January 12, 1987 and January 20, 1987, respectively. Oppositions to Metrolina's Application for Review were filed by Las Americas and by Comserv on April 28, 1987 and April 30, 1987, respectively.

[13] Comserv filed an Opposition to Committee's Contingent Application for Review on February 2, 1987.

[14] On December 8, 1987, Multicultural filed an Opposition to Memphis Telecasters' November 25, 1987 Petition for Leave to File *Amicus* Brief.

[15] *See Anax Broadcasting Inc.*, 88 FCC 2d 607, 611 ¶ 10 (1981), and the cases cited therein. *See* also *ASD Answer Service*, 1 FCC Rcd 753, 756 ¶¶ 22-23 (1986).

[16] Coalition relies on a letter, dated November 22, 1989, from William Johnson (on behalf of Roy Stewart, Mass Media Bureau Chief) to Senator Lautenberg for the proposition that it is entitled to intervene in this proceeding. Far from suggesting that Section 1.223 gives Coalition the right to intervene at this late stage of the proceeding, the letter states only that "[t]hose interested in intervening . . . *may seek to intervene* by filing a Petition with the Commission, pursuant to Section 1.223, as Global has done." (emphasis added). Moreover, Coalition offers no explanation for why it waited more than two months after the Lautenberg letter to request intervention.

[17] To the extent that Coalition urges that WNNK is Newark's last remaining commercial radio station, it complains of only minimal contact between Newark's other broadcast outlets and the community, and that these stations offer no local service to the community. However, such evidence has no bearing on whether Newark's need for an additional transmission outlet exceeds Jersey City's need for first local transmission service under Section 307(b) of the Act. Allegations that Newark's other stations do not adequately serve the community's needs should be raised in proceedings involving those stations. By the same token, the Commission has indicated that Global may not be the regular licensee on 290A. Thus, to the extent that Coalition relies on the uniqueness of the format offered by Global, this does not give Coalition a justiciable interest in this proceeding. In any event, the Commission generally leaves the choice of station format to the discretion of the licensee. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

[18] There is no merit to Coalition's claim that approving the agreement offers no public interest benefits because the Commission, in anticipation of the expected delay in resolving this adjuducatory proceeding for regular authority to operate on FM channel 290A, appointed an interim operator to serve the public while this proceeding was pending. Expedited resolution of this lengthy and time-consuming adjudicatory case would free the substantial resources committed by both the Commission and

the private parties to resolving this case. This would serve the public interest even if approval of the agreement did not bring first local transmission service to Jersey City.

[19] Except for the letters and the Municipal Council Resolution noted in paragraph 1 above, the only opposition to the agreement comes from Global and from Coalition, neither of which has demonstrated that it should be permitted to intervene at this late stage of this case. The Committee, which previously sought to file an *amicus* brief if Omnilingual's request for a foreign language programming issue became decisionally significant, does not object to the proposed settlement agreement, but requests that its Contingent Application for Review be given appropriate consideration if Omnilingual fails to dismiss its application.

[20] Section 73.3525(b) provides that where conflicting applications involve a determination of fair, equitable and efficient distribution of service under 47 U.S.C. § 307(b) and an agreement provides for the dismissal of the only applicant specifying a particular community, the Commission must determine whether the proposed agreement would unduly impede the fair and equitable distribution of radio service among the States and communities. Where the Commission concludes that the withdrawal of the only applicant or applicants for a community would have this effect, it must give other persons the opportunity to apply for the facility in that community before acting on the settlement agreement.

[21] The Commission has approved settlement agreements in Section 307(b) cases under which the surviving applicant amended to adopt the community of license specified by the dismissing applicant without requiring republication of its availability in that community. *See, e.g., Broadcast Service of Carolina, Inc.*, 22 FCC 2d 1, 4 ¶ 5, recon. denied, 24 FCC 2d 140 (Rev. Bd. 1970).

[22] We have considered the possibility of conditioning approval of the settlement agreement upon Las Americas' remaining in Newark. However, we find, on balance, that grant of Las Americas' amended application for Jersey City would better serve the public interest in view of the policy considerations encompassed in Section 73.3525(b).

[23] *See, e.g., California Broadcasting Corp.*, 90 FCC 2d 800, 808 ¶ 17 & n.27 (1982) and the cases cited therein.

[24] *See Anax Broadcasting Inc.*, 87 FCC 2d 483, 488-89 ¶¶ 16-17 (1981) ("[the *O' Conner* test] should be interpreted in light of the equities of the case, especially where . . . a proffered amendment is intended to cure a disqualifying defect"). *See* also *Crosthwait v. FCC*, 584 F.2d 550, 555-56 (D.C. Cir. 1978) (court admonished Commission not to reject curative amendment that would not prejudice any competing applicant).

[25] *Beaufort County Broadcasting Co.*, 94 FCC 2d 572, 574-75 ¶¶ 6-7 (Rev. Bd. 1983), review denied, FCC 84-824 (June 19, 1984), *aff'd sub nom. Beaufort County Broadcasting Co.v. FCC*, 787 F.2d 645 (D.C. Cir. 1986).

[26] *See, e.g. Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126, 2137 ¶ 69 (Rev. Bd. 1987), review denied, 4 FCC Rcd 2553 (1989), recon. denied, 4 FCC Rcd 6312 (1989) (failure to properly maintain local public file, by itself, does not warrant disqualification); *Voice of the People*, 82 FCC 2d 200, 202 ¶ 6 (1980) (harassment of individual seeking to inspect local public file does not warrant the absolute disqualification of sole remaining applicant).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-353

In re Application of

Jerry L. Roth d/b/a RICHMOND HILL BROADCASTING — File No. BPH-870819MG

For Construction Permit for
New FM facility, Channel 287A
Richmond Hill, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 1990; Released: March 15, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. In the *Hearing Designation Order*, 4 FCC Rcd 6353 (1989)(HDO), in this proceeding, it was specifically ordered that in the event of a grant of the application of Richmond Hill Broadcasting (RHB), "Jerry L. Roth [shall] divest himself of all interests in and sever all connections with Stations WSGA(AM) and WZAT-FM (Savannah, Georgia) prior to commencement of program test authority." *Id.*, at 6355.

2. By *Memorandum Opinion and Order*, FCC 90M-310, released February 16, 1990, the presiding Administrative Law Judge approved a universal settlement agreement in this proceeding and granted the application of RHB; however, the grant was not made subject to the above divestiture/severance condition.

3. On February 23, 1990, the Commission's Mass Media Bureau (Bureau) filed an Appeal, pursuant to Section 1.302 of the Commission's Rules, 47 C.F.R. §1.302, requesting that the Board issue an appropriate order specifying the required divestiture/severance condition with respect to RHB's construction permit. RHB has supported the Bureau's request in comments filed February 26, 1990, noting that the existing 3.16 mV/m contour of WZAT(FM) will overlap the predicted 3.16 mV/m contour of RHB's proposed Richmond Hill, Georgia facility (in violation of the "multiple ownership" provisions of 47 C.F.R. §73.3555). In light of the clear requirements of the HDO and Roth's reiteration of his intention to sever all connections with the Savannah stations, the condition to RHB's construction permit will be here incorporated.

4. ACCORDINGLY, IT IS ORDERED, That the Appeal filed February 23, 1990 by the Mass Media Bureau IS GRANTED, and that the grant of the construction permit to Jerry L. Roth d/b/a Richmond Hill Broadcasting (File No. BPH-870819MG) IS CONDITIONED upon the following:

That Jerry L. Roth shall divest himself of all interests in and sever all connections with Stations WSGA(AM) and WZAT-FM, Savannah, Georgia prior to commencement of program test authority.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-625

In re Applications of

ARNOLD L. CHASE (Transferor) File No. BTCCT-851030KF

and

CHASE BROADCASTING, INC. (Transferee)

For Consent to the Transfer of Control of Arch Communications Corp., Licensee of Station WTIC-TV, Channel 61, Hartford, Connecticut

ARCH COMMUNICATIONS CORP. File No. BRCT-881201KW

For Renewal of License of Station WTIC-TV, Channel 61, Hartford, Connecticut

DECISION

Adopted: December 28, 1989; Released: March 14, 1990

By the Commission:

BACKGROUND

1. We consider here the applications set out in the caption in light of the court's decision in *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*). As recounted there, the transfer application seeks our consent to the transfer of control of Arch Communications Corp. (Arch), licensee of station WTIC-TV (Ind., channel 61), Hartford, Connecticut, from Arnold L. Chase to Chase Broadcasting, Inc. (Chase Broadcasting). Chase Broadcasting is ultimately controlled by David T. Chase (Chase Senior), father of Arnold L. Chase (Chase Junior).[1] Chase Broadcasting also owns all of the stock of The Ten Eighty Corp., licensee of stations WTIC(AM) and WTIC-FM, Hartford. Section 73.3555(b) of the Commission's Rules, 47 C.F.R. § 73.3555, often referred to as the one-to-a-market rule, generally prohibits the creation of radio/television combinations in the same market. Former Note 4 to that rule, however, provided that applications by radio licensees to acquire a UHF station in the same market, such as station WTIC-TV, would be considered on a case-by-case basis. Chase Broadcasting and Arch accordingly submitted a showing under Note 4, in which they urged that the proposed common control of the radio and television stations in Hartford would be consistent with the public interest. Astroline Communications Co., L.P. (Astroline), licensee of station WHCT-TV (Ind., channel 18), Hartford, filed a petition to deny the transfer application. In *Arnold L. Chase*, 61 R.R.2d 111 (1986), we found the applicants' Note 4 showing to be persuasive, denied Astroline's petition and granted the application.[2]

2. Astroline appealed our decision to the United States Court of Appeals for the District of Columbia Circuit, but no party sought a stay of the effectiveness of the grant of the application. Although our decision was not final because of the pending appeal, the grant was effective, under the provisions of section 1.103 of the Rules. The parties to a sale may close a transaction when a Commission action is effective, but before finality. They do so at their own risk, however, because the Commission or the courts may later require the sale to be set aside. *See, e. g., Improvement Leasing Co.*, 73 F.C.C.2d 676, 684 (1979), *aff'd sub nom. Washington Association for Television and Children v. FCC*, 665 F.2d 1264 (D.C. Cir. 1981). In the WTIC-TV case, the applicants elected to take that risk and closed the transaction on October 2, 1987. Chase Broadcasting has controlled station WTIC-TV since that date.

3. While the *Astroline* appeal was pending, we initiated a Rule Making proceeding in which we proposed to modify the one-to-a-market rule. *Notice of Proposed Rule Making in MM Docket No. 87 - 7*, 2 F.C.C. Rcd. 1138 (1987). After consideration of the comments filed, we amended the rule to its current form. *Amendment of Section 73.3555*, 4 F.C.C. Rcd. 1741, *reconsideration granted in part*, 66 R.R.2d 1115 (1989).

4. The license for station WTIC-TV specified an expiration date of April 1, 1989. Arch therefore filed its application for renewal of license on December 1, 1988, as required by section 73.3539(a) of the Rules. Accordingly, we also consider here Arch's renewal application.[3]

5. The court in *Astroline* remanded the transfer proceeding for consideration of several issues. These are: (1) whether Chase Broadcasting or Chase Senior acquired *de facto* control of Arch at some time prior to our approval of the transfer application; (2) whether the acquisition of station WTIC-TV by Chase Broadcasting would result in an anticompetitive concentration of ownership and control of media in the Hartford market; (3) whether Arch's financial position was deliberately crippled during the station's first year of operation in order to manufacture a "failing company" to advance its request for an exception to the one-to-a-market rule; (4) whether Chase Junior misrepresented his intention to divest his 5.445-percent interest in Chase Broadcasting when he applied, through Arch, for a construction permit for channel 61, Hartford; and (5) whether a grant of a one-to-a-market exception and the transfer application would be consistent with the public interest. *Astroline*, 857 F.2d at 1573-74.

6. With regard to those issues, the court concluded that the Commission failed to follow a two-step analysis of Astroline's pleadings to determine whether a hearing was required by section 309(d) of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. § 309(d). *Astroline*, 857 F.2d at 1562 and 1573-74. The court stated that the first step in that analysis is, assuming that "all the supporting facts alleged in the affidavits are true, would a

reasonable factfinder conclude that the ultimate fact in dispute had been established." *Id.* at 1561, quoting *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). If such a *prima facie* case is alleged, the second step is whether, based on the information in the application, all of the pleadings and other matters of which we may take official notice, a substantial and material question of fact is presented. *Astroline*, 857 F.2d at 1561. If so, a hearing must be held.

7. By letter of April 10, 1989, the staff gave Arch and Chase Broadcasting the opportunity to submit any amendments to their one-to-a-market showing that they thought were in order under the amended rule, as well as to comment on the matters raised by the court. Arch responded on April 28, 1989, and Astroline filed comments on June 2, 1989.[4] With that background, we turn to the analysis of the issues remanded to us by the court.

De Facto Control/Real Party in Interest [5]

8. The court directed that we determine whether proof that control of Arch had passed to Chase Broadcasting prior to our approval of such a transfer would render a grant of the application *prima facie* contrary to the public interest. *Astroline*, 857 F.2d at 1573. Further, if we determine that Chase Broadcasting "was from the beginning an undisclosed partner" in Arch, we should articulate standards to evaluate such allegations in one-to-a-market cases. *Id.* at 1566. In the event that a hearing is required, the court stated that one of the avenues Astroline would be permitted to explore is "the source of funds expended on Arch's construction and development." *Id.* at 1572.

9. We generally believe that an unauthorized assumption of control may be disqualifying in the context of a one-to-a-market case because the applicant's actions, if proved, would violate section 310(d) of the Act, and constitute an abuse of process.[6] In our view, it is an abuse of process to specify a surrogate to apply for a station so as to deny the Commission and the public the opportunity to review and pass on the qualifications of that party. Further, if Chase Broadcasting or its principals intended to control Arch from the outset and that fact had been disclosed in the application for a construction permit, the order initiating the comparative hearing among the several applicants would have specified a one-to-a-market issue against Arch [7] and the Chase family's other media interests would have weighed in the comparative balance. In those circumstances, it would also be a clear abuse of process to put Arch forward as ostensibly controlled by Chase Junior, in order to avoid the one-to-a-market issue and comparative factors that would otherwise be reviewed in the hearing.[8]

10. The following allegations concerning possible *de facto* control of Arch can be officially noted or are adequately supported by an affidavit from a person with first-hand knowledge of the facts.

A. Chase Junior was and is a 5.445-percent stockholder in the Chase family enterprises that control Chase Broadcasting, and was a program director of WTIC-FM before he applied, through Arch, for the construction permit for channel 61, Hartford.

B. In the course of the comparative hearing, Chase Junior, by affidavit dated October 6, 1981, denied that Chase Senior would be "the major source of financing" for Arch. In an affidavit dated January 16, 1986, Chase Senior took a similar position, but did state that he had made loans to Chase Junior "for a variety of business purposes," and, for the benefit of lenders, had guaranteed the liquidity of Chase Junior's holdings in the various Chase family enterprises. As specifically noted by the court, the purchase agreement between Arch and Chase Broadcasting, dated October 29, 1985, recites in part that "the Purchaser [Chase Broadcasting] and its shareholders have rendered and continue to stand ready to offer . . . financial assistance" to Arch.

C. Three months before station WTIC-TV began broadcasting, counsel disclosed to the Commission that Chase Senior and his daughter intended "to acquire a substantial equity interest in Arch," subject to "any necessary FCC approval."

D. Throughout the relevant period, Chase Junior continued to participate in other Chase family enterprises, including entities that lease transmitter, studio and office space to Arch. Further, Ownership Reports on file with the Commission disclose that Chase Junior also held a 40-percent interest (as cotrustee) in Chase Communications Corp., from at least February 10, 1986, through June 30, 1988, a period that begins before the Commission's approval of the transfer of Arch to Chase Broadcasting on September 12, 1986, and continued well after the consummation of that transaction on October 2, 1987. Chase Communications Corp., through subsidiaries, filed an application to acquire station WPTY-TV, channel 24, Memphis, Tennessee, on February 10, 1986, which was granted March 28, 1986. The parties closed the sale on June 30, 1986. A contract also on file discloses that in August of 1984, Chase Junior pledged all of the stock of Arch as security for a revolving line of credit for the use of Arch and three separate Chase family limited partnerships.[9]

E. After station WTIC-TV began operation, Arch and Chase Broadcasting shared the same counsel and the same national sales representative, and the stations advertised on one another.

F. After the sale, Chase Junior continued his affiliation with Chase Broadcasting as its Chief Executive Officer, and was personally relieved of responsibility for debts incurred by Arch.

11. Commission precedent establishes that questions as to possible *de facto* control, in contrast to *de jure* control, must be decided on a case-by-case basis. *See, e.g., Turner Broadcasting System, Inc.*, 101 F.C.C.2d 843, 848 (1985). A wide variety of factors may be relevant in reaching a determination. *See generally William S. Paley*, 1 F.C.C. Rcd. 1025 (1986), *reconsideration denied*, 2 F.C.C. Rcd. 2274 (1987), *aff'd sub nom. Fairness In Media v. FCC*, 851 F.2d 1500 (D.C. Cir. 1988)(*mem.*); and *News International, PLC*, 97 F.C.C.2d 349 (1984). Those decisions tend to focus on a person's ability to control finances, personnel and programming, *News International*, 97 F.C.C.2d at 357-58, and, where appropriate, the ability or inability to dominate the company's Board of Directors. *William S. Paley*, 1 F.C.C. Rcd. at 1026. Chase Broadcasting takes the position that Astroline's allegations, if accepted as true, do not show Chase Senior or Chase Broadcasting to be in

control of Arch's finances, personnel, programming or its Board prior to the Commission's approval of the transfer application. It concludes, therefore, that Astroline has failed to plead a *prima facie* case and that Astroline's petition must be denied.

12. We believe Chase Broadcasting's position would be correct, if no family relationships were involved. Such relationships are involved, however, and because case-by-case judgments are to be made in this area, that factor must be considered. We have stated that "[f]amily relationship standing alone is insufficient to create the presumption that common control by all family members exist over a broadcast facility in which one family member has an interest." *KTRB Broadcasting Co.*, 46 F.C.C.2d 605, 607 (1974). Further, the fact that a father lends funds to his son to permit the latter's entrance into broadcasting does not necessarily lead to a finding that the father was in *de facto* control of an applicant or licensee. *See, e.g., High Sierra Broadcasting, Inc.*, 96 F.C.C.2d 423, 435-36 (Rev. Bd. 1983). Those statements were made in cases where the Commission made a case-by-case review called for in this context, and concluded that no problem existed under the facts presented. In this case, however, "a close, intertwined family relationship exists between principals" of two stations. *Alabama Radio Corp.*, 69 F.C.C.2d 1256, 1262 (1978). In such cases, legitimate concerns exist as to compliance with the multiple-ownership rules, and the applicants "have the burden of establishing that, despite a close familial relationship, the stations involved are independently operated and owned." *Id.* at 1262-63.

13. Although family relationships, without more, are not presumed to establish that stations are commonly controlled, it is equally true that we do not automatically assume that stations controlled by relatives will be "independently operated and controlled." In essence, we must review the facts alleged to determine whether Chase Junior started off on a business venture of his own, or whether he applied for and operated the station in cooperation with, or under the control of, Chase Senior or Chase Broadcasting. As indicated above, however, Arch's pleadings attack the sufficiency of Astroline's pleadings, but do not provide information to bolster the independence of Arch and Chase Junior. *Compare Alabama Radio Corp.*, 67 F.C.C.2d 1256, 1263 (1978) ("The applicant has provided a detailed account of the involvement of. . . [the] family members in the respective stations," which established independent operations). Astroline's allegations establish that Chase Junior has not distanced himself from his father and the family enterprises. Instead, the allegations before us show that Chase Junior was involved in Chase family businesses before, during and after his stated control of Arch. Accepting the facts alleged as true, which we must at this stage of our analysis, there has been a continuing relationship between the Chase family businesses in the form of leases or use of property, loans or other financial assistance, and shared independent contractors. Chase Junior also participated in other family businesses, including the purchase of another television station, and the pledge of Arch stock as security for a line of credit in part used by three family businesses other than Arch. In reviewing these allegations, we bear in mind the court's statement in *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392 (D.C. Cir. 1985), that under section 309 of the Act,

> "*prima facie* sufficiency" means the degree of evidence necessary to make, not a fully persuasive case, but rather what a reasonable factfinder *might* view as a persuasive case -- the quantum, in other words, that would induce a trial judge to let a case go to the jury even though he himself would (if nothing more were known) find against the plaintiff.

Id. at 397, emphasis in original. Viewing Astroline's allegations under that standard, we conclude that it has made a *prima facie* case that Arch has not established that it was "independently owned and operated" and, accordingly, that Chase Broadcasting or Chase Senior may have been a real party in interest or that Arch was under the *de facto* control of Chase Broadcasting or Chase Senior.

14. The court determined that if we find that a *prima facie* case has been made, it would be arbitrary and capricious to conclude that no substantial and material question of fact exists. *Astroline*, 857 F.2d at 1567.[10] Because such questions exist, the issue as to the control of Arch must be resolved in hearing. There is no clear line in the record establishing when such control might have been acquired. We believe that the appropriate time frame starts with the filing of Arch's application for a construction permit.[11] The closely related issue of possible abuse of process will also be specified.

One -.To - A - Market Showing

15. The court remanded two aspects of the one-to-a-market issue. First, it called for an explication of the question as to whether the transfer of control of station WTIC-TV to Chase Broadcasting, which already controlled stations WTIC(AM) and WTIC-FM, would result in an anticompetitive concentration of ownership and control. In that connection, "the Commission must first identify the boundaries of [the] 'relevant market.'" *Id.* at 1569. Further, the court directed the Commission "to articulate -- or, if necessary, to develop -- standards to guide itself" in considering such factors as the market shares of the radio and television stations seeking a one-to-a-market exception, the shares of competing broadcast outlets, the availability of cable television systems in the area, and the size of the market." Id. The court also stated that "there were no findings as to the particular impact [the Arch/Chase Broadcasting] consolidation will have on the ability of Astroline's UHF service to survive in [the Hartford] market." *Id.* at 1568. Second, the court ordered further consideration of the question as to whether Arch's financial position was "deliberately crippled in order to manufacture a 'failing company' situation" to advance its request for an exception to the one-to-a-market rule. *Id.* at 1572 n. 8.

16. *Concentration of Control* In *Amendment of Section 73.3555*, 4 F.C.C. Rcd. 1741, *reconsidered in part*, 66 R.R. 2d 1115 (1989), we did in fact define the relevant market and develop other standards for evaluating one-to-a-market showings. 4 F.C.C. Rcd. at 1751-54.[12] The revised standards were specifically intended to respond to the concerns expressed by the court, *id.* at 1759 n. 83, and accordingly meet our "generalized duty to consider anticompetitive effects of license transfers." *Astroline*, 857 F.2d at 1570. While the revised standards do not incorporate some of the factors the court thought might be relevant on remand, it based its decision on an analysis of Commission one-to-a-market cases decided under the for-

mer standard. We do not believe that the court's list of factors was intended to circumscribe the nature of the showing to be adopted in the Rule Making proceeding. Our decision in *Amendment of Section 73. 3555* represents our public interest judgment in balancing "our continuing desire to retain the public interest benefits from competition and diversity against the potential benefits from joint ownership of stations." 4 F.C.C. Rcd. at 1750. The issue of undue concentration of control of the mass media is therefore subsumed within the revised standards adopted for reviewing one-to-a-market cases, which will be addressed below.[13]

17. We believe that the balance struck in the Rule Making proceeding vitiates the concern expressed by the court as to the effect of the transfer of control of station WTIC-TV to Chase Broadcasting on Astroline's financial viability. In that regard, our regulatory scheme relies heavily on competition to advance the public interest. The fact that Arch and Chase Broadcasting seek to take advantage of a combination that may be permissible under existing standards, which were adopted after consideration of competitive effects generally, does not mean that we are required to protect Astroline from competition.[14] As the Supreme Court stated:

> Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 475 (1940). The standards set out in *Amendment of Section 73. 3555* serve to protect the public. Accordingly, we conclude that the specific effect of the Arch/Chase Broadcasting combination on Astroline is not relevant to our decision as a matter beyond the competitive considerations generally incorporated into our one-to-a-market standards.[15]

18. *Deliberate Creation of a " Failing Station "* The court ordered further consideration of the question as to whether Arch's financial position was "deliberately crippled to manufacture a 'failing company' situation" to advance its request under former Note 4 to Section 73.3555 for an exception to the one-to-a-market rule. *Astroline*, 857 F.2d at 1574.[16] Astroline generally alleges that Arch's facilities are state of the art. Further, Mr. Richard P. Ramirez, Astroline's controlling General Partner, alleges in his affidavit that on three occasions Astroline's bid for program packages lost to a higher bid from Arch, and that Arch's bid in one of those cases was above the price suggested by the program syndicator before bids were accepted. With regard to the purchase of the program packages, Mr. Ramirez relies on statements made by a representative from the syndicator. No affidavit from that person was submitted. By placing allegedly high bids, Mr. Ramirez contends that, "by its own choice, WTIC-TV's programming budget is *probably* larger" than other independent stations in the market. Emphasis added. Further, Mr. Ramirez states that station WTIC-TV " *likely* has the largest library of future release, off-network syndicated programming" in the market. Emphasis added.[17]

19. Applying the two-step process for analyzing pleadings under the provisions of section 309(d) of the Act, as part of the inquiry into whether a *prima facie* case has been made, we begin with a review of the kinds of facts alleged. Not every allegation of fact is the basis for establishing a *prima facie* case under section 309(d). The statute requires that allegations must be specific, and must be either facts of which we can take official notice, or be supported by an affidavit from a person with first-hand knowledge of the facts alleged. When establishing the current pleading requirements, Congress specifically adopted a statutory scheme under which "allegations of ultimate, conclusory facts or more general allegations based on information and belief, supported by general affidavits, . . . are not sufficient." S. Rep. No. 630, 86th Cong. 1st Sess. 3 (1959).[18] That statement has been quoted with approval on several occasions by the court. *See, e.g., Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 629 (D.C. Cir. 1978). We note that the *Astroline* court stated that "the Commission must treat 'as established' the petitioner's charge that a 'failing company' scheme motivated Arch's expenditures in order to determine whether the scheme would render the proposed consolidated *prima facie* inconsistent with the public interest." *Astroline*, 857 F.2d at 1571. We understand the court to mean that we must accept "as established" those allegations of fact that meet the statutory criteria.

20. Our records establish that station WTIC-TV operates with maximum power from atop a tall tower. Arch characterizes its facilities as state of the art. We accept as fact that maximum facilities are more expensive to lease, construct and operate than more modest facilities. With respect to program acquisition, however, matters that are "likely" or "probable" are not specific allegations of fact. Further, facts assertedly made by a program syndicator are not matters to which Mr. Ramirez can attest from personal knowledge. In a bidding process, it is expected that the highest bidder will win, and the fact that Astroline's low bid lost to Arch's higher bid is not surprising.[19] Nor is it surprising that bids in what is essentially an auction-like process might exceed what the seller anticipated before the auction. Moreover, the allegations submitted to us are also fully consistent with another explanation; that is, the applicant sought to become competitive by maximizing its facilities and buying expensive programming it thought would be attractive to viewers. We do not believe that allegations of fact can be considered "specific" within the meaning of the Act when they support this equally plausible explanation that is fully consistent with the public interest. Finally, the court's concern focused on Arch's motivation; that is, Arch may have deliberately lost money to establish losses to support its subsequent one-to-a-market showing. Because Astroline's allegations can be easily read to support a conclusion that is fully consistent with the public interest, we cannot conclude that such allegations constitute specific facts sufficient to infer a *prima facie* case of an improper motive. We conclude that the facts alleged are either not adequately supported or are not specific, and do not, therefore, meet the requirements of the statute.

21. Because the court has directed a review of the standards to be applied in this case, we take the opportunity to make clear what a petitioner would need to plead in order to establish a *prima facie* case with regard to alleged deliberate losses in one-to-a-market cases. As a general mattter, a business person may be willing to ac-

cept start-up losses, based on the hope that profits will result in the future. Such losses are unobjectionable under the public interest standard, and we do not understand the court to be concerned as to such losses. Rather, its concern focuses on the possibility that a licensee might create or exacerbate losses motivated by a desire to enhance a future one-to-a-market request. In our opinion, if the marketplace is to work freely, we must expect wide variations in business judgments as to how best to create an economically viable enterprise that can be responsive to marketplace forces. We are very reluctant to second guess broadcasters in this regard. If we were to explore such matters routinely in hearings, licensees might deliberately limit expenses that they might otherwise incur for fear that this agency might later find that they should not have sought the best facilities or programming for the public. Obviously, there are strong public interest factors supporting the use of maximum facilities in terms of efficient use of the spectrum, wide-area coverage and better reception. Similarly, some programs cost more to acquire than others, generally because they are more popular. A Commission policy that discourages the broadcast of popular programming is certainly to be avoided.

22. Consequently, we believe that a high burden of pleading should be imposed in this context. We conclude that simply alleging that a particular licensee built state-of-the-art, maximum or near-maximum facilities and bought expensive programming are insufficient. We believe that facts should be alleged, in the manner required by the statute, that support a conclusion that such expenses were incurred deliberately, and would not otherwise have been made, in order to buttress a favorable one-to-a-market ruling at a later date. We recognize that this places a heavy burden on a petitioner, but we do so to avoid the greater harm of discouraging expenditures that benefit the public. We have not hesitated to impose high pleading requirements in other contexts where the public interest so demands.[20] Accordingly, even if we were to accept Astroline's allegations of fact as adequately supported, which we do not, it has failed to make a *prima facie* case.

23. *Amended One - To - A - Market Showing* As noted, we changed our standards for reviewing one-to-a-market waiver cases after our initial approval of the transfer of control of Arch to Chase Broadcasting. The court observed in an analogous context:

> The Commission, in an intervening proceeding, has determined that the policy previously applied in cases like this one no longer serves the public interest, convenience and necessity, and therefore will not be applied henceforth. We hold that in such circumstances an agency cannot be required to apply a policy it has rejected. Such a requirement would amount to a command to the agency to disregard its statutory mandate: it would have to employ a policy that, by its own determination, did not serve the public interest.

Washington Association for Television and Children v. FCC, 665 F.2d 1264, 1268 (D.C. Cir. 1981) (footnote omitted).[21] Accordingly, we apply the subsequently adopted waiver standards (now incorporated in a new Note 7 to section 73.3555) to the case on remand, and our previous grant of the application under the former Note 4 standards must be reconsidered under the new criteria.

24. In *Amendment of Section 73.3555*, above, we established three categories of applicants for the purposes of processing one-to-a-market waiver cases. First, we stated that we would be predisposed to grant applications involving "failed stations." A failed station must either be off the air for a substantial period of time, or be in voluntary or involuntary bankruptcy. 4 F.C.C. Rcd. at 1752. Second, we stated that we would be favorably disposed to grant applications when the radio and television stations involved are located in the top 25 ADI television markets and where, following the proposed combination, there will remain 30 separately owned, operated and controlled broadcast licensees or "voices." *Id.* at 1751. Finally, all other applicants will be considered on a "more rigorous" case-by-case basis, but viewed in light of five enumerated factors. *Id.* at 1753.

25. Arch does not qualify under the failed-station standard. Arch asserts that Hartford-New Haven is the 23rd largest ADI market and that 36 separate broadcast voices are found there. Arch believes, therefore, that it qualifies under the top 25/30 voices standard. Astroline does not contest Hartford-New Haven's rank as the 23rd market, but contends that there are only 24 voices available. To determine the number of voices, we stated that we would count "all full-power TV stations, both commercial and noncommercial, licensed to the relevant ADI television market" and the operating "AM and FM radio stations licensed to the relevant TV metropolitan market," as defined by the most recent volume of Arbitron's *Television ADI Market Guide*. *Id.* at 1751 and 1759 nn. 84 and 85. The 1988-1989 *Television ADI Market Guide* defines the Hartford-New Haven television ADI as the State of Connecticut, except for Fairfield County in the southwest corner of the State. It also defines two television metropolitan markets within the ADI: Hartford County and New Haven County. Arch, for a variety of reasons, believes that the two counties should be combined, and it is on that ground that it believes that a total of 36 voices should be found. That is not, however, the standard adopted in the Rule Making proceeding. The language adopted refers to a singular market, and the *Television ADI Market Guide* specifies two separate markets with separate data within the Hartford-New Haven ADI. The time to seek a redefinition of the relevant television market was in the Rule Making proceeding, not in this adjudication.[22] Thus, Astroline's count of 24 voices, based on the Hartford television metropolitan market, is correct, and Arch does not qualify under the top 25/30 voices standard.

26. We turn then to the individual factors set out in *Amendment of Section 73.3555*, 4 F.C.C. Rcd. at 1753. First is the benefit to be derived from the economies of scale of a joint operation. We now expect applicants to outline these potential benefits with specificity. The general statements made by Arch do not provide the required specificity. *Compare Great American Television and Radio, Inc.*, 4 F.C.C. Rcd. 6347 (1989) (required specificity established). Second, we look at the facilities of the stations involved, which are in this case: WTIC(AM), 1080 kHz, 50 kW, unlimited time, with a directional pattern at night; WTIC-FM, 96.5 MHz, 20 kW effective radiated power from a height above average terrain of 810 feet; and WTIC-TV, channel 61, 5,000 kW effective radiated visual power from a height above average terrain of 1,692 feet. These are all very desirable facilities. The third factor is the number of broadcast outlets in the relevant market

owned by the applicant, which, in this case, is the maximum normally permitted. Fourth, we review the financial difficulties of any station(s), including "whether the station has long been offered for sale, to no avail." 4 F.C.C. Rcd. at 1753. There is nothing in the record to suggest that station WTIC-TV was ever offered for sale to any buyer other than Chase Broadcasting, and the financial showing now required is subject to much closer scrutiny.[23] Fifth, we review the nature of the relevant market in light of our traditional diversity and competition concerns, especially with respect to the number of broadcast outlets and separate "voices" that would exist if the merger were approved, as well as the degree of cable penetration and the availability of other nonbroadcast media. We lack complete information on the fifth factor, particularly with regard to the availability of nonbroadcast media. After consideration of these factors, we do not find Arch's and Chase Broadcasting's showing to be persuasive. We understand that their showing was premised on the belief that they qualified under the top 25/30 voices standard. We could ask Arch for more information from the applicants as to the five factors that govern this case, especially factors one and five. Such information would be subject to another round of pleadings, might not resolve the issue, and would delay the initiation of the hearing that we have determined must be held on other issues. In these circumstances, therefore, we believe it is appropriate to specify an issue in the hearing regarding compliance with the one-to-a-market waiver standards.

Misrepresentation/Divestiture of Interests

27. In November, 1979, when Arch filed its application for a construction permit for channel 61, Hartford, Chase Junior worked at WTIC-FM and held a 5.445-percent ownership interest in its corporate parent. In that application, Chase Junior stated that if Arch received the construction permit, he would divest his ownership interest and sever his employment with the radio station. The Order designating Arch's and two other applications for comparative hearing provided that a grant of Arch's application would be subject to the condition that Chase Junior, as represented, separate himself from Chase Broadcasting before the television station began operation under program test authority. Hearings were conducted, but the applicants settled the case before the presiding officer issued a decision. Arch was the surviving applicant, and received its construction permit on October 3, 1983. On April 30, 1984, the Commission adopted new standards for identifying those interests that would be considered cognizable for the purposes of administering the multiple-ownership rule. *Attribution of Ownership Interests*, 97 F.C.C.2d 997 (1984), *reconsidered in part*, 58 R.R.2d 604 (1985), *further reconsidered*, 1 F.C.C. Rcd. 802 (1986). The 1984 *Attribution* decision established that where a corporate licensee is controlled by a single majority stockholder, all other stock interests are noncognizable, 97 F.C.C.2d at 1008-09, a standard left unchanged by the subsequent decisions on reconsideration. Before station WTIC-TV began operation under program test authority, counsel for Arch notified the staff that while Chase Junior would sever his employment with the radio station, counsel believed that divestiture of Chase Junior's 5.445-percent ownership interest was not required under the multiple-ownership rule because of Chase Senior's status as a single majority stockholder of Chase Broadcasting. The staff concurred.

28. In its pleadings, Astroline noted the divestiture representation in the application, but alleged that Chase Junior remained involved in the radio station, apparently in reference to the retained ownership interest.[24] These statements and facts, according to Astroline, constituted a misrepresentation to the Commission. The Commission disagreed in its first decision. *Arnold L. Chase*, 61 R.R.2d at 135. The court, however, remanded for further consideration the question of possible misrepresentations. *Astroline*, 857 F.2d at 1574.

29. We have reviewed Astroline's pleadings and do not find any fact alleged that we can officially notice or that is supported by an affidavit from a person with first-hand knowledge of the facts suggesting that Chase Junior intended to deceive the Commission at the time of his divestiture representation. We have often stated that intent is a necessary element in finding misrepresentation or lack of candor. *See, e.g., Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127 (1983). Representations to the Commission are, of course, taken seriously, but we have also recognized that plans may be altered with the passage of time or by changed circumstances. *See News International, PLC*, 97 F.C.C.2d 349, 354 n. 14 (1984). Moreover, an intent to deceive is not automatically inferred from circumstances where a licensee makes a representation in light of Commission standards in existence at the time, but later changes its position after the Commission altered the requirements underlying the representation. If we were to find otherwise, a licensee that made a representation under one standard would not be able to avail itself of the benefits of the revised standard. We find that Astroline has failed to plead a *prima facie* case and that there is no other ground for inquiring as to Chase Junior's departure from his initial statements. Accordingly, no issue will be specified on this point.

CONCLUSION

30. We have carefully reviewed the pleadings and related material before us, our revised one-to-a-market waiver requirements, and the court's decision remanding the proceeding to us. For the reasons indicated above, we believe that Astroline has raised issues that must be explored in a hearing. In the circumstances of this case, we believe the public interest will be served by permitting Chase Broadcasting to retain control of the station during the course of the hearing.

31. Accordingly, IT IS ORDERED that the pleadings filed by Astroline Communications Company, L.P., are granted to the extent indicated above, and are denied in all other respects.

32. IT IS FURTHER ORDERED that Astroline Communications Company, L.P., is made a party to this proceeding.

33. IT IS FURTHER ORDERED that the applications set out in the caption are designated for hearing, pursuant to section 309(e) of the Act, on the following issues:

(1) To determine whether David Chase, Cheryl C. Freedman, Chase Broadcasting, Inc., or its corporate affiliates, individually or together, were real parties in interest to the application of Arch Communications, Inc., for a construction permit for a new commercial television station to operate on channel 61, Hartford, Connecticut;

(2) To determine whether David Chase, Cheryl Freedman, Chase Broadcasting, Inc., or its corporate affiliates acquired control of the permit or the license for channel 61, Hartford, Connecticut, before the Commission consented to such a transfer of control;

(3) To determine whether Arch Communications, Inc., Chase Broadcasting, Inc., or their corporate affiliates or principals abused the Commission's processes in connection with the filing and prosecution of the construction permit and transfer applications;

(4) To determine, in light of the evidence adduced under the preceding issues, whether the applicants possess the requisite qualifications to hold a Commission license;

(5) To determine whether the combination of radio and television operations in Hartford, Connecticut, as proposed by the applicants, is consistent with the public interest;

(6) To determine, in light of the evidence adduced under the preceding issues, whether a grant of either or both the pending transfer and renewal applications would serve the public interest, convenience and necessity.

34. IT IS FURTHER ORDERED that this document constitutes a Notice of Apparent Liability for a forfeiture for violation of section 310(d) of the Communications Act of 1934, as amended, and section 73.1015 of the Commission's Rules. The Commission has determined that in every case designated for hearing for revocation or denial of license applications for alleged violations that also come within the purview of section 503(b) of the Communications Act of 1934, as amended, it shall as a matter of course include this forfeiture notice so as to maintain the fullest range of possible actions. Because the procedure is thus a routine or standard one, we stress that the inclusion of this notice is not to be taken as indicating in any way what the initial or final disposition of the case should be. That judgment is, of course, to be based on the facts of each case.

35. IT IS FURTHER ORDERED that Astroline Communications Company, L.P., shall introduce its evidence as to issues (1) through (4), and that the applicants shall then introduce their evidence and have the burden of proof with regard to all issues.

36. IT IS FURTHER ORDERED that to avail themselves of the opportunity to be heard, the applicants and Astroline Communications Company, L.P., shall file a written appearance stating an intention to appear on the date fixed for hearing and present evidence on the issues specified in this decision. As required by section 1.221(c) of the Commission's Rules, those appearances shall be submitted in person or by counsel, in triplicate, within 20 days of the mailing of this Decision.

37. IT IS FURTHER ORDERED that the applicants shall give notice of the hearing, as required by section 311(a)(2) of the Communications Act of 1934, as amended, and section 73.3594 of the Commission's rules, and shall advise the Commission of the publication of that notice, as required by section 73.3594(g).

38. IT IS FURTHER ORDERED that the Secretary shall send copies of this Decision to all parties by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Chase Broadcasting is a wholly owned subsidiary of Chase Communications, Inc., which in turn is wholly owned by D. T. Chase Enterprises, Inc. The latter is owned by Chase Senior (51.98 percent), Chase Junior (5.445 percent) and Cheryl C. Freedman (42.575 percent), who is the daughter of Chase Senior and sister of Chase Junior. On May 31, 1988, the staff granted a *pro forma* application (BTCCT-880511KH) transferring control of Arch from Chase Broadcasting to Chase Communications, Inc. Because our earlier ruling and the court's decision referred to Chase Broadcasting, we shall retain that name for our discussion here.

[2] We also denied petitions and objections filed by six Hartford-area licensees against the transfer application. None of those six entities participated further in the proceeding.

[3] On March 1, 1989, IST Broadcasting, Inc. (IST), filed a timely application for a construction permit for a new commercial television station to operate on channel 61, Hartford, which was mutually exclusive with the WTIC-TV renewal application. Subsequently, Arch and IST reached a settlement under which IST agreed to dismiss its application. The staff reviewed the agreement, found it consistent with the public interest, and dismissed the IST application on July 17, 1989.

[4] We hereby grant Astroline's motion of May 3, 1989, for an extension of time to file its comments on June 2, 1989. Arch later filed a supplemental pleading on June 14, 1989. On June 23, 1989, Astroline filed a motion to strike Arch's June 14 pleading or, alternatively, for permission to respond. Astroline filed such a response on July 28, 1989. In our discretion, we shall consider the June 14 and July 28 pleadings.

[5] The phrase "real party in interest" is usually used in connection with pending applications, while " *defacto* control" ordinarily refers to licensed stations. The general question in either context is whether parties other than those set out in an application control the applicant or licensee. "The test for determining whether a third person is a real party-in-interest is whether that person has an ownership interest or is or will be in a position to actually or potentially control the operation of the station." *High Sierra Broadcasting, Inc.*, 96 F.C.C.2d 423, 435 (Rev. Bd. 1983). Similarly, in determining whether a person possesses *de facto* control, "we are governed chiefly by the demonstration of his power to dominate the management of corporate affairs." *Benjamin L. Dubb*, 16 F.C.C. 274, 289 (1951). For ease of reference, and unless otherwise indicated, we shall use here the phrase " *de facto* control" to include "real party in interest."

[6] The court stated in *Astroline*, that evidence of *de facto* control of Arch by the Chase family could raise questions about Chase Junior's candor in submissions to the Commission. 857 F.2d at 1564. We are, of course, concerned about misrepresentations, but a necessary element for misrepresentation is intent. *See, e.g., Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127 (1983). Our review of Astroline's pleading does not disclose a *prima facie* showing of intent, and no misrepresentation issue will be added at this time.

[7] When processing mutually exclusive applications for construction permits for new stations, the staff does not rule on requests for one-to-a-market exceptions. Instead, it specifies an issue on that subject to be resolved in the comparative hearing.

[8] We are concerned about possible abuses of our processes and have, in different contexts, taken steps to address the problem. *See, e.g., First Report and Order (Docket 81 - 742)*, 4 F.C.C. Rcd. 4780 (1989); *Dr. Bernard Boozer*, 4 F.C.C. Rcd. 1568 (1989); and *Revision of Form 301*, 3 F.C.C. Rcd. 4112 (1988).

[9] The copy in our files is not signed. We assume, however, that counsel submitted the document because it was required to be filed by section 73.3613, and that the pledge agreement was in fact executed.

[10] The court summarized its position as follows:

> If the Commission concludes that [Astroline] has satisfied the threshold requirement of section 309(d)(1) with respect to the *de facto* control issue raised here the Commission should conduct an evidentiary hearing and make findings concerning the degree of control, if any exercised over Arch by [Chase Senior], the Chase family, or [Chase Broadcasting] during the relevant time period.

Id. at 1573.

[11] At one point, the court stated that its concern as to the control of Arch began from the time Arch won the channel 61 construction permit and continued through the filing of the transfer appplication. *Astroline*, 857 F.2d at 1567. Other parts of the decision suggest that the court's concern also applies to the time when the construction permit was pending. *E.g., id.* at 1563 and 1564. We believe the safer course is to use a broad time frame, starting with the filing of the Arch construction permit application.

[12] The court specifically suggested that we consider whether financial advantages accruing to Chase Broadcasting as a result of the combined radio-television operation, in contrast to the benefits to be derived by Arch alone, should be a factor in making one-to-a-market determinations. *Astroline*, 857 F.2d at 1572 n. 8. Our decision in *Amendment to Section 73.3555* rests in part on the economic benefits of joint radio/television operations, which by definition apply to stations owned by the buyer.

[13] Astroline correctly notes that the Chase family also controlled two radio stations in Stamford, Connecticut, WSTC(AM) and WJAZ(FM). Stamford is not encompassed by the Grade A contour of station WTIC-TV, nor is it within the Hartford-New Haven area of dominant influence (ADI). Astroline urged that we should consider concentration of control of the mass media in the region. We rejected that concept specifically in *Regional Concentration of Control*, 101 F.C.C.2d 402 (1984), *reconsideration denied*, 100 F.C.C.2d 1544 (1985). For the reasons given in that proceeding, we would not resurrect the issue of regional concentration of control here. In any event, the Chase family has already sold the Stamford radio stations to a third party.

[14] We do not deny that a WTIC-AM-FM-TV combination may establish a stronger competitor for Astroline. Even if that fact were relevant to our decision, there would be no basis for further inquiry in this case. There is no specific showing that Astroline's financial difficulties are the result of Chase Broadcasting's media combination. Further, such a showing appears exceedingly difficult to establish. With or without the approval of the transfer application, Astroline would still compete with six commercial and three commonly controlled noncommercial stations licensed to serve cities in the market. Arbitron *1988 - 1989 Television ADI Market Guide*, p. 609. Further, within the Hartford-New Haven ADI, there are 24 cable television systems serving 668,900 subscribers, representing 76 percent of the total television households in the market. *Id.* It strains reason to assume that Astroline's financial difficulties result only from a grant of the transfer application, given the degree of over-the-air and cable competition in the market.

[15] Formerly, under the policy described in *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958), a petitioner could allege that the grant of a construction permit for a new station in a market might result in a net degradation of service to the public. Petitioners always faced a heavy burden of pleading to establish the need for a hearing on a *Carroll* issue. *See, e.g., WLVA, Inc. v. FCC*, 459 F.2d 1286 (D.C. Cir. 1972). If a petitioner made such a showing, and the hearing established a net degradation of service to the public, the new applicant would not necessarily be denied a construction permit. Instead, there would be a comparative evaluation of the new applicant and the existing licensee(s). Even if the *Carroll* doctrine were applicable here, therefore, and if Astroline had met the pleading requirements under the *Carroll* case law (which it has not done) and then established a net degradation of service, Astroline would not necessarily prevail. Moreover, the applicability of the *Carroll* doctrine to a transfer application was always very doubtful. *See, e.g., Valley Telecasting, Inc. v. FCC*, 338 F.2d 278 (D.C. Cir. 1964), and *Channel 41, Inc.*, 30 F.C.C.2d 6 (1971). In any event, after thorough consideration, we determined that the *Carroll* doctrine is inconsistent with the public interest. *Policies Regarding Detrimental Effects of Proposed New Broadcast Stations*, 3 F.C.C. Rcd. 638 (1988), *clarified*, 4 F.C.C. Rcd. 2276 (1989). Accordingly, examining the effect on Astroline of the WTIC-AM-FM-TV merger would be inappropriate.

[16] Under our current one-to-a-market standards, Arch would not have been considered a "failed station," because it was neither off the air nor was it in bankruptcy. *Amendment of Section 73.3555*, 4 F.C.C. Rcd. at 1752-53.

[17] We have also reviewed the pleadings filed initially by entities that are no longer participating in the remanded proceeding. Those pleadings that address the issue either submit no affidavits or submit affidavits based on "information and belief," or on "knowledge, information and belief," without specifying which of several facts are based on personal knowledge. Those affidavits are no more or less illuminating as to this issue than the material submitted by Astroline.

[18] The pleading standards under the Act are therefore markedly different from those used, for example, in civil proceedings in the federal district courts. *See, e.g.*, Fed. R. Civ. P. 8(a) (a pleading to initiate a trial "shall contain a short and plain statement of the claim showing that the pleader is entitled to relief. . . ."); and Fed. R. Civ. P. 11 ("pleadings need not be verified or accompanied by affidavit."). In fact, the pleading of specific facts is not generally required in civil proceedings in the federal district courts. *See, e.g., B & B Investment Club v. Kleimart's Inc.*, 391 F. Supp. 720 (C.D. Pa. 1975).

[19] In fact, competitors outbid Arch on other occasions. For example, Astroline outbid Arch's $1.2 million offer for a package of "Night Court" episodes.

[20] *See, e.g., Radio Carrollton*, 72 F.C.C.2d 264, 271 (1979) ("strike" petitions); *Mike Bramble*, 58 F.C.C.2d 565 (1976) (deliberate suppression of news to aid the licensee's economic position); and *Mrs. J.R. Paul*, 26 F.C.C.2d 591 (1969) (deliberate news distortion).

[21] The court there suggested that a different result might be reached if the change in policy was motivated solely by litigation strategy on the Commission's part. *Id.* at 1268, n. 5. That clearly is not the case here. First, the *Astroline* court specifically invited the Commission to review and develop standards for reviewing one-to-a-market cases. 857 F.2d at 1569. Second, we

issued our proposal to amend the rule on February 20, 1987, about seven months before the court issued its decision in *Astroline*. We could not have anticipated the court's decision at that time. Finally, we have been generally reviewing and modifying the multiple-ownership rules to update them and to reflect substantial changes in the marketplace since the Commission originally adopted the rules. *See, e.g., Regional Concentration of Control*, 101 F.C.C.2d 402 (1984), *reconsideration denied*, 100 F.C.C.2d 1544 (1985); *Amendment of Section 73.3555 (Seven-Station Rule)*, 100 F.C.C.2d 17 (1984), *reconsidered in part*, 100 F.C.C.2d 74 (1985). The one-to-a-market proceeding is but one in a line of decisions on this subject that long antedate the one-to-a-market case before us here, and which were designed to update the rule.

[22] Arch, Chase Broadcasting and its principals did not file comments in the Rule Making proceeding or seek reconsideration of the rule adopted.

[23] As noted above, the court determined that one of the avenues to be explored is the source of funds expended for Arch's construction and operation. *Astroline*, 857 F.2d at 1572. Such information may reflect on the degree of Arch's financial distress because if Chase Broadcasting's resources "were available before the attempt to consolidate, it is reasonable to infer that they would remain available" without the merger. *Id.* at 1566. The court also stated that if we should determine "that the Chase family was from the beginning an undisclosed partner in the Arch application," we should set out standards for evaluation of Arch's financial problems. *Id.* In that connection, we have determined above that questions of unauthorized assumption of control may be disqualifying, and the financial arrangements between Arch and Chase Broadcasting and its principals are relevant to that issue. On the other hand, if the control questions are resolved favorably to the applicants, then to the extent that financial arrangements exist or existed between them, Chase Broadcasting would be considered in essentially in the same position as any other lender or lessor.

[24] We note that this case does not involve the award of a construction permit where a comparative choice rested in whole or in part on the extent to which the applicant owned or controlled media outlets.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SATELLITE TRANSPONDER LEASING CORPORATION — File No. 1841-DSS-MISC-89

Request for Interim Assignment of the SBS-6 Domestic Fixed-Satellite to the 99^0 W.L. Orbital Location

COMSAT GENERAL CORPORATION — File Nos. 2097-DSS-ML-89, 2098-DSS-ML-89

Request for Interim Assignment of the SBS-1 and SBS-2 Domestic Fixed-Satellites to the 97^0 W.L. Orbital Location

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 1990; Released: March 14, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Satellite Transponder Leasing Corporation (STLC) has applied for authority to locate its SBS-6 satellite, which is assigned to 72^0 W.L., to 99^0 W.L. on a temporary basis.[1] Comsat General Corporation (Comsat) has requested that if STLC's application is granted, it be permitted to relocate its SBS-1 and SBS-2 satellites to 97^0 W.L. on a temporary basis. SBS-1 and SBS-2 are assigned to 74^0 W.L. but are currently being operated at 99^0 W.L. American Satellite Company d/b/a Contel ASC (Contel ASC), American Telephone and Telegraph Company (AT&T) and Comsat filed comments on STLC's request; STLC, Hughes, and MCI Communications Corporation (MCI) filed comments on Comsat's request. For the reasons discussed below, both requests are granted.

2. SBS-6 is scheduled to be launched in June 1990. Although it is assigned to 72^0 W.L., STLC seeks authority to launch SBS-6 into 99^0 W.L. and to operate it from that location until that location is ready to be occupied by Hughes' Galaxy A-R satellite in 1993. At that time, STLC states it will relocate SBS-6 to 72^0 W.L. STLC intends to use SBS-6 to provide interim service to Hughes' customers from 99^0 W.L. while Galaxy A-R is being built. Hughes' customers can then be transitioned to Galaxy A-R without the need to repoint their antennas. STLC submits that grant of its request will serve the public interest by allowing these customers' needs to be met for the three years before Galaxy A-R is launched.

3. Comsat's SBS-1 and SBS-2 satellites are currently in-orbit at 99^0 W.L., but are assigned to 74^0 W.L.[2] The satellites are permitted to remain at 99^0 W.L. until that location is ready to be occupied by the Hughes domestic fixed-satellite that is assigned to that location.[3] Comsat states that it is willing to accommodate STLC's request for an interim assignment of SBS-6 to 99^0 W.L. if it is authorized to relocate SBS-1 and SBS-2 to 97^0 W.L. on a temporary basis. Comsat states that relocating SBS-1 and SBS-2 to 97^0 W.L. will facilitate its continuing service to its customers. It also states that it will relocate SBS-1 and SBS-2 to their assigned 74^0 W.L. location when AT&T launches Telstar 401 into its assigned 97^0 W.L. location in 1992.

4. No petitions to deny either STLC's request or Comsat's request were filed. The only issues were raised by AT&T and Contel ASC, who discussed the potential for interference from SBS-6 at 99^0 W.L. into their operations at adjacent locations, and by MCI, who is concerned about interference from SBS-1/2 into its operations at 95^0 W.L.

5. Contel ASC, who is assigned to the 101^0 W.L. location, states that if STLC's request is granted, it will have to coordinate twice -- once with SBS-6 and once with Galaxy A-R -- forcing it to bear additional costs. To mitigate the additional costs, Contel ASC requests that Hughes agree to maintain the same center frequencies for its television and wideband data signals on Galaxy A-R as will be used on SBS-6. AT&T, whose Telstar 401 satellite is assigned to 97^0 W.L., is concerned that it will be difficult to coordinate Telstar 401's video distribution services with the very small aperture terminal (VSAT) services provided over SBS-6. AT&T requests that the Commission condition the grant of STLC's request on STLC's successful coordination of its operations at 99^0 W.L. with AT&T's planned video and other use at 97^0 W.L. Finally, MCI is concerned about potential interference from Comsat's video operations on SBS-1 and SBS-2 at 97^0 W.L. into SBS-3's single-channel-per-carrier (SCPC) operations at 95^0 W.L., and requests that Comsat be required not to assign video traffic to transponder 2 on both SBS-1 and SBS-2.

II. DISCUSSION

6. The temporary use of an unoccupied orbital location may, under certain circumstances, achieve more efficient use of the orbit-spectrum resource. Thus, the Commission has granted licensees authority to provide service from particular unoccupied orbital locations when the interim use provides tangible benefits to the public and does not adversely affect other domestic satellite carriers.[4]

7. Granting STLC's request will allow it to begin to serve customers from 99^0 W.L. three years earlier than would otherwise be possible. No other potentially affected operator has requested that SBS-6's interim assignment be denied. Comsat states that it is willing to accommodate STLC and its customers provided that SBS-1 and SBS-2 are permitted to operate from 97^0 W.L. until Telstar 401 is launched. AT&T does not object to this arrangement. Thus, allowing STLC to operate SBS-6 from 99^0 W.L. on a temporary basis will benefit the public with no accompanying detriments. STLC's and Comsat's requests are therefore granted.

8. Further, no extraordinary conditions regarding adjacent satellite coordination will be imposed on either STLC or Comsat, as suggested by several commenters. No commenter has presented any potential problems that appear insurmountable or that otherwise require a license condition. STLC has represented that it will designate the

same center frequencies for video and wideband data signals on SBS-6 that ultimately will be assigned on Galaxy A-R, alleviating Contel ASC's concerns. In addition, as STLC notes, SBS-6 is a mixed-use satellite; it will not provide only VSAT services, as suggested by AT&T. Therefore, it should be able to be coordinated with Telstar 401 through ordinary coordination procedures. Finally, with respect to MCI's concerns, the Commission has recognized that variations in transponder plans at Ku-band are common. It has also stated that a standard frequency plan is not necessary and that coordination can be accomplished through established methods.[5] Thus, SBS-6 and SBS-1/2 should be able to be successfully coordinated with adjacent satellites without the need for Commission involvement.

III. CONCLUSION

9. Accordingly, IT IS ORDERED that application file No. 1841-DSS-MISC-89 IS GRANTED and Satellite Transponder Leasing Corporation IS AUTHORIZED to locate temporarily the SBS-6 satellite at the 99^0 W.L. orbital location until the satellite assigned to 99^0 W.L. is launched.

10. IT IS FURTHER ORDERED that application file Nos. 2097/2098-DSS-ML-89 ARE GRANTED and Comsat General Corporation IS AUTHORIZED to relocate temporarily the co-located satellite pair, SBS-1 and SBS-2, to the 97^0 W.L. orbital location until the satellite assigned to 97^0 W.L. is launched.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Concurrently with this application, an application was filed to transfer control of STLC from International Business Machines (IBM) to Hughes Communications Galaxy, Inc. (Hughes). That application is granted today in a companion order. Satellite Transponder Leasing Corporation Transfer, File Nos. 1836, 1839, 1840-DSS-TC-89. STLC states that the reassignment request is not contingent upon disposition of the SBS-6 transfer application, and therefore it is being considered separately.

[2] SBS-1 and SBS-2 were initially assigned to 99^0 W.L. and 97^0 W.L., respectively, but were co-located (temporarily at 99^0 W.L.) and reassigned to 74^0 W.L. at Comsat's request. *See* Comsat General Corporation, 3 FCC Rcd 4071 (1988); Comsat General Corporation, 2 FCC Rcd 4570 (1987). *See also* Assignment of Orbital Locations to Space Stations in the Domestic Satellite Service, 3 FCC Rcd 6972 (1988) at n. 42, recon. 5 FCC Rcd 179 (1990).

[3] *Id.*

[4] *See, e.g.*, Letter from Chief, Domestic Facilities Division to Counsel, GTE Spacenet Corporation, STA File No. 2112-DSS-STA-89 (September 13, 1989) (permitting interim use of 93^0 W.L. by GSTAR 3); Letter from Chief, Domestic Facilities Division to Counsel, GTE Spacenet Corporation (April 22, 1986) (permitting interim use of 124^0 W.L. by GSTAR 3); Satellite Business Systems, Mimeo No. 5207 (released July 9, 1984) (permitting interim use of 101^0 W.L. by SBS-4).

[5] *See* Assignment of Orbital Locations to Space Stations in the Domestic Satellite Service, 3 FCC Rcd 6972 (1988) at n. 42, recon. 5 FCC Rcd 179 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

HUGHES COMMUNICATIONS GALAXY, INC. — File Nos. 1377-DSS-MP/ML-89, 1378-DSS-MP/ML-89

For Modification of Space Station Authorizations of its Galaxy IV-R and Galaxy V-W Satellites in the Domestic Fixed-Satellite Service

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 1990; Released: March 14, 1990

By the Chief, Common Carrier Bureau:

1. Before the Bureau are the above-referenced applications of Hughes Communications Galaxy, Inc. (Hughes). Hughes requests that the satellite authorizations for its 4/6 GHz band[1] Galaxy IV-R and Galaxy V-W satellites[2] be modified to permit these satellites to be equipped with 16 watt instead of 10 watt amplifiers. [3] On May 31, 1989, these applications were placed on public notice.[4] No petitions to deny or comments were filed regarding these applications. For the reasons discussed below, Hughes's request is granted.

2. In November 1988, the Commission consented to the assignment to Hughes of the licenses and authorizations used in connection with Western Union Corporation's (Western Union) 4/6 GHz band domestic fixed-satellite system, which included the Westar IV and Westar V satellites.[5] As part of its agreement to transfer the Westar system to Hughes, Western Union filed applications to construct, launch, and operate replacement satellites for Westar IV and Westar V. It proposed that each replacement carry 24 transponders, each with a bandwidth of 36 MHz and a nominal output power of 10 watts. In December 1988, the Commission authorized Hughes to construct, launch and operate these replacement satellites and to sell the satellite transponders on a non-common carrier basis.[6] These replacement satellites, Galaxy IV-R and Galaxy V-W, are assigned to the 99^0 W.L. and 125^0 W.L. locations, respectively.

3. Hughes contends that the increase in satellite transponder amplifier power from 10 to 16 watts will increase the nominal equivalent isotropically radiated power (EIRP) on each satellite by 2 dB from 36 dBW to 38 dBW. Hughes states that approval of its request will permit all the transponders on Galaxy IV-R and Galaxy V-W to provide improved EIRP performance for video, audio, data, and voice services. Hughes asserts that consumers of these services in the contiguous United States (CONUS), Alaska, Hawaii, Puerto Rico, and the Virgin Islands could then use smaller antennas, thus lowering user costs. Further, Hughes contends that the use of 16 watt amplifiers is becoming standard in the next generation of 4/6 GHz satellites, as evidenced by the fact that the Commission authorized GTE Spacenet Corporation to construct three hybrid satellites using 16 watt amplifiers for its 4/6 GHz band operations.[7] Also, it argues that Hughes itself was authorized to replace Galaxy I, Galaxy II, and Galaxy III with satellites that will have a transponder output power of 16 watts and EIRPs of 38.0 dBW.[8] Thus, Hughes claims that increasing the power of Galaxy IV-R and Galaxy V-W to 16 watts will provide its customers with many significant benefits inuring from improved EIRP performance, and that approval of its request will allow Hughes to compete more effectively with other satellite operators.

4. Grant of the power increase proposals submitted by Hughes will serve the public interest, convenience and necessity. The proposed power increase will permit Hughes to provide improved EIRP performance as well as lower costs of antennas. No comments were filed opposing Hughes's request. Moreover, similar requests have been granted in the past.[9] In order to document its contention that its proposal will not cause harmful interference to adjacent satellite systems, Hughes conducted an interference analysis. Its analysis assumes an interfering satellite such as Galaxy IV-R or Galaxy V-W using 16 watt power amplifiers with an EIRP 2.0 dB higher than the lower power adjacent satellites 2^0 away using only 10 watt power amplifiers. Hughes's analysis, based on typical system performance requirements, indicates that its proposal would not affect the operation of typical adjacent satellite systems. Hughes's comparison of its frequency modulated wide and narrow band television (FM-TV), high speed digital, wide and narrow band digital single channel per carrier (SCPC) and FM-SCPC services with other similar services on typical adjacent satellite systems indicates that typical system performance requirements would be met. Hughes's analysis is unchallenged by other potentially affected parties.

5. A review of Hughes's analysis indicates that any worst case interference conflicts can be avoided with care in planning radio frequency (r.f.) carrier frequency assignments and other transmission parameters by the potentially affected satellite operators. Thus, the proposed modified Hughes satellites can be operated in a manner consistent with 2^0 satellite spacings in the 4/6 GHz bands.

6. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, IT IS ORDERED that application File Nos. 1377/1378-DSS-MP/ML-89 ARE GRANTED, and Hughes Communications Galaxy, Inc. IS AUTHORIZED to modify the technical parameters of its Galaxy IV-R and Galaxy V- W satellites as specified in those applications.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The precise frequency bands addressed here are 3.7 - 4.2 GHz (downlink) and 5.925 - 6.425 GHz (uplink).

[2] Galaxy IV-R was formerly named Westar IV-R; Galaxy V-W was formerly named Westar V-R. *See* Public Notice, Report No. DS-931 (January 24, 1990).

[3] *See* Hughes Communications Galaxy, Inc., 3 FCC Rcd 6989 (1988) (authorizing construction, launch and operation of Westar IV-R and V-R replacement satellites, both equipped with 10 watt amplifiers, conditioned upon the consummation of the Western Union Corporation-Hughes assignment).

[4] Public Notice, Report No. DS-860 (May 31, 1989).

[5] *See* Western Union/Hughes Assignment Order, 3 FCC Rcd 6792 (1988).

[6] Hughes Communications Galaxy, Inc., *supra* note 3.

[7] GTE Spacenet Corporation, 3 FCC Rcd 6986 (1988).

[8] Hughes Communications, Galaxy, Inc., *supra* note 3.

[9] RCA American Communications, Inc., File Nos. 1533/1534/1535/1536-DSS-MP/L-83 (released January 28, 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

INTERNATIONAL BUSINESS MACHINES CORPORATION, Transferor	File Nos. 1838-DSS-TC-89 1839-DSS-TC-89 1840-DSS-TC-89
and	
HUGHES COMMUNICATIONS GALAXY, INC., Transferee	
SATELLITE TRANSPONDER LEASING CORPORATION, Licensee	
For Consent to the Transfer of Control of Satellite Transponder Leasing Corporation	

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 1990; Released: March 14, 1990

By the Chief, Common Carrier Bureau:

INTRODUCTION AND BACKGROUND

1. International Business Machines Corporation (IBM), Hughes Communications Galaxy, Inc. (Hughes) and Satellite Transponder Leasing Corporation (STLC) (collectively, the Applicants) request that the Commission consent to the transfer of control of STLC from IBM to Hughes. STLC is the licensee of the SBS-4 and SBS-5 domestic fixed-satellites, both of which are in-orbit, and the licensee of SBS-6, which is not yet launched. Scientific-Atlanta, Inc. (Scientific-Atlanta) filed comments. For the reasons discussed below, the application is granted.

2. IBM is a New York corporation with its principal place of business in Armonk, New York. IBM's operations are primarily in the field of information-handling systems, equipment and services. Hughes, a California corporation, is one of several affiliated Hughes Aircraft Company entities providing specialized communications services to a wide range of domestic and international customers. Hughes owns and operates the Galaxy and Westar satellite systems. STLC, a Connecticut corporation, is a wholly-owned subsidiary of IBM.

3. The proposed transaction among the Applicants, as evidenced by the Stock Purchase Agreement dated July 7, 1989, entails Hughes purchasing from IBM all of the issued and outstanding stock of STLC. Hughes will purchase the STLC stock with internal funds. Hughes anticipates that MCI Communications Corporation, which is currently under contract to provide telemetry, tracking and control (TT&C) operations for SBS-4, SBS-5 and SBS-6 (upon launch), will continue to provide these services after the transfer of control. STLC has been granted authority to provide the transponders on SBS-4, SBS-5 and SBS-6 to users on a noncommon carrier basis.[1] Hughes asserts that it intends to have STLC continue to make use of this authority subsequent to the transfer of control. Hughes states that it will ensure that STLC continues to honor all of its existing contracts related to SBS-4, SBS-5 and SBS-6.

4. Hughes asserts that the transfer will enhance its ability to provide a wide range of domestic satellite services, increasing its ability to compete effectively with other domestic telecommunications providers. It states that STLC's satellites combined with Hughes's own telecommunications interests will account for a *de minimis* share of the domestic interexchange telecommunications market.

5. No oppositions or petitions to deny the proposed transfer were filed.[2] Scientific-Atlanta filed comments on the Applicants' transfer request. Scientific-Atlanta provides very small aperture terminal (VSAT) equipment and services, and, in this capacity, competes directly with Hughes Network Systems, Inc., an affiliate of Hughes.[3] While not opposing the application, Scientific-Atlanta is concerned that the transfer could have anticompetitive effects on the VSAT market. Thus, it requests that any grant be conditioned to prohibit Hughes from discriminating in favor of Hughes's own VSAT equipment and service affiliates. Specifically, Scientific-Atlanta states that in the VSAT marketplace, "communities of interest" have developed around particular satellites serving a particular industry or industry sector, such that there are significant economic advantages associated with serving members of these communities of interest on that particular satellite. Scientific-Atlanta asserts that such a community of interest has developed on STLC's SBS-4 satellite. This community of interest serves the automotive industry and is based largely on the Automotive Satellite Television Network (ASTN), which is a dealer-oriented programming service serving almost 6,000 domestic auto dealers. Scientific-Atlanta contends that if an automobile manufacturer desires to install its own VSAT network to connect its dealers to a central location, it and its dealers save considerable expense if that new network can be installed on SBS-4, so that the dealers already served by ASTN do not need a separate VSAT earth station to access a different satellite. Scientific-Atlanta contends that where there is such a satellite serving a given community of interest, a VSAT vendor's ability to obtain capacity on that satellite can become a crucial issue in the vendor's ability to compete effectively for the provision of service and equipment to members of that user community. Finally, Scientific-Atlanta asserts that the potential exists for the satellite operator to favor an affiliated vendor over a direct competitor in offering available capacity. This would impede effective competition and harm the interests of both competitors and consumers.

6. Scientific-Atlanta therefore requests the Commission to regulate Hughes's offerings on the SBS satellites. Specifically, it requests that Title II common carrier regulation be imposed on any Hughes/STLC short term service offerings.[4] According to Scientific-Atlanta, short term offerings, whether sales or leases, do not qualify for treatment under the Commission's transponder sales policies.[5] Therefore, it asserts that these offerings must be regulated

on a common carrier basis. Scientific-Atlanta also requests the Commission to condition STLC's noncommon carrier sales and long-term lease authority. It states that any grant of such authority should expressly prohibit Hughes from unreasonably discriminating in favor of its own VSAT equipment and service affiliates in making capacity available and in setting prices and terms of these offerings.

DISCUSSION

7. The Commission is required to consider any anticompetitive consequences of a proposed acquisition as part of its public interest finding.[6] In making this assessment, the relevant product and geographic markets must be considered. In addressing the interexchange telecommunications transmission market, the Commission has traditionally focussed on three distinct product markets -- domestic interexchange telecommunications service,[7] international message telephone service (IMTS) and non-IMTS.[8] Domestic interexchange services are supplied in a single national market, while the geographic markets for all international services are delineated on a country-by-country basis.[9] The Commission has determined that neither IBM, Hughes nor STLC is dominant in any of these markets.[10] With respect to the domestic interexchange market, STLC's satellite interests combined with Hughes's telecommunications interests are not of sufficient magnitude to give Hughes power in this market. No comments were filed that were inconsistent with this conclusion. Under this approach, the proposed transfer raises no anticompetitive concerns in the provision of domestic interexchange communications services.

8. Scientific-Atlanta acknowledges that Hughes will not be dominant in the interexchange market. It further acknowledges that Hughes will not have a dominant position in offering Ku-band satellite capacity. Rather, its concerns involve individual Ku-band satellites and the potential for Hughes to offer Ku-band capacity on specific satellites to its VSAT affiliates on discriminatory terms. To foreclose this possibility, it requests the Commission to impose restrictive conditions on all of Hughes's Ku-band service offerings on SBS satellites. These restrictions are inappropriate and will not be placed on Hughes.

9. Scientific-Atlanta's requested conditions are based on the premise that the acquisition will give Hughes power in the "VSAT market."[11] However, the Commission has never defined the relevant product market as narrowly as Scientific-Atlanta defines it.[12] VSAT services provide an alternative to traditional terrestrial interexchange networks. Thus, VSAT services are considered part of the domestic interexchange market, not a separate market.[13]

10. Further, aside from the variety of terrestrial services available as alternatives to VSAT service suppliers, a wide range of Ku-band satellite offerings are currently available from a variety of providers. Even with STLC's satellites, Hughes would hold licenses for only 5 of the 25 Ku-band satellites authorized. Other domestic satellite operators such as GTE Spacenet Corporation (GTE Spacenet), American Satellite Company d/b/a Contel ASC (Contel ASC) and GE American Communications, Inc. (GE Americom) are currently providing VSAT services. Indeed, GTE Spacenet and Contel ASC both offer "end-to-end" VSAT services and no complaints have been filed with respect to these offerings. Other entities are also expected to offer VSAT services as their authorized Ku-band systems are implemented.[14] Thus, Scientific-Atlanta and other providers have ample opportunity to develop their VSAT businesses on a variety of satellites.

11. While conditions may be imposed on licensees to the extent they are necessary to further the public interest, conditions restricting Hughes's service offerings are not appropriate at this time. Scientific- Atlanta's requested conditions are based solely on speculation regarding Hughes's conduct after the acquisition. Scientific-Atlanta has presented no probative evidence that Hughes can or will discriminate in favor of its own VSAT equipment and service affiliates to impede competition in the domestic interexchange market, or that it will pursue VSAT "communities of interest" on the SBS satellites by anti-competitive means. STLC is currently authorized to offer all the transponders on SBS-4, 5 and 6 to customers on a noncommon carrier basis. Scientific-Atlanta has provided no sound basis on which to rescind this authority once control of STLC has passed to Hughes.[15] Indeed, Scientific-Atlanta acknowledges that "it is likely today that Hughes would . . . have received broad authority to offer transponders for sale or long-term lease on a noncommon carrier basis" on these satellites.[16] Contrary to Scientific-Atlanta's assertion, once transponders are authorized for sale on a non-common carrier basis, no restrictions on the terms or conditions of those offerings are contemplated. To hold otherwise would expose buyers and sellers of transponder capacity to a kind of uncertainty transponder sales were designed to avoid as a means of encouraging investment in space segment capacity.[17] By definition, noncommon carrier offerings are made to particular customers on customized terms, rather than on a uniform, indiscriminate basis.[18]

12. By not imposing conditions on Hughes's offerings, we are not "abandoning the field," as Scientific-Atlanta contends.[19] Should Scientific-Atlanta acquire evidence that demonstrates that Hughes is abusing its transponder sales authority by discriminating against VSAT vendors in favor of its own VSAT equipment and service affiliates to the detriment of the public interest, these matters can be considered when acting on transponder sales requests on SBS replacement satellites.[20] Scientific-Atlanta also could pursue anti-trust remedies.

CONCLUSION

13. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, IT IS ORDERED that the Application File Nos. 1838/1839/1840-DSS-TC-89 ARE GRANTED and International Business Machines Corporation IS AUTHORIZED to transfer control of Satellite Transponder Leasing Corporation and its above referenced communications facilities to Hughes Communications Galaxy, Inc.

14. IT IS FURTHER ORDERED that all existing terms and conditions applicable to the space station authorizations held by Satellite Transponder Leasing Corporation shall remain in full force and effect.

15. The grantees are afforded thirty days to decline this authorization as conditioned. Failure to respond within this period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Letter from Chief, Domestic Facilities Division to Robert J. Bennett (March 13, 1986).

[2] American Telephone and Telegraph Company (AT&T) filed comments on the request of STLC for interim assignment of SBS-6 to 99° W.L. *See* File No. 1841-DSS-MISC-89. Although those comments also bear a caption relating to this proceeding, they do not oppose or seek the imposition of any condition on the transfer of control of STLC to Hughes.

[3] In contrast, IBM/STLC provides only space segment capacity to VSAT networks.

[4] Under Title II, the "just and reasonable" standards of Sections 201(b) and 202(a) apply and Section 208 complaint procedures are available. *See* 47 U.S.C. §§ 201(b), 202(a) and 47 U.S.C. § 208.

[5] Domestic Fixed-Satellite Service: Transponder Sales, 90 FCC 2d 1238 (1982) (*Transponder Sales Order*), *aff'd sub nom.* Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984) (*Wold*).

[6] *See, e.g.*, GTE Corporation and Southern Pacific Company, 94 FCC 2d 235, 249 (1983) (GTE/SPC); 15 U.S.C. Sec. 21.

[7] *See* Competitive Carrier Services, Fourth Report and Order, 95 FCC 2d 554, 573 (1983) (*Competitive Carrier*).

[8] *See* International Competitive Carrier Policies, 102 FCC 2d 812, 828 (1985) (*International Carrier*), *recon. denied*, FCC 86-339 (released July 29, 1986).

[9] *Competitive Carrier*, 95 FCC 2d at 574; *International Carrier*, 102 FCC 2d at 828.

[10] *Competitive Carrier*, 95 FCC 2d at 575; *International Carrier*, 102 FCC 2d at 830 and 833.

[11] *See, e.g.*, Scientific-Atlanta Reply Comments at 5 and 16.

[12] *See* Communications Satellite Corporation, 2 FCC Rcd 7202, 7205 (1987), *aff'd*, 3 FCC Rcd 7277 (1988); *see also* Equatorial Communications Services, 2 FCC Rcd 7297 (1987), *aff'd* , 3 FCC Rcd 7277 (1988).

[13] *Id.* VSAT services on particular satellites, of course, represent an even smaller sector of the interexchange market than VSAT services generally.

[14] For example, American Telephone and Telegraph Company and National Exchange Satellite, Inc. have both indicated that they are planning to offer VSAT services over their newly authorized Ku-band satellites. *See* application of American Telephone and Telegraph Company, File Nos. 6028/29-DSS-P/L-87 and 6030-DSS-P-87, at 2; application of National Exchange, Inc., File Nos. 6022/23-DSS-P/LA-87 and 6024-DSS-P-87, at I-2 and I-8.

[15] We disagree with Scientific-Atlanta that future sales on the SBS-4 and 5 satellites do not qualify under the *Transponder Sales Order* and should be treated as common carrier offerings because the transponders can not, at this time, be sold for the "life of the satellite." Scientific-Atlanta Reply at 13. The age of a satellite, and hence the expected life of the transponder, whether "short" or "long" term, has never been a factor in considering transponder sales requests. *See Transponder Sales Order*, 90 FCC 2d at 1255-57. Transponder sales have been approved on satellites at all stages of their lives, including those on which only a few years of life remained. *See, e.g.*, Western Union Corporation, 3 FCC Rcd 6792 (1988) (non-common carrier authority granted for Westars 3, 4 and 5, which already had been operating for nine, six and six years, respectively). Thus, we will not distinguish between Hughes's "short-term" and "long-term" offerings, as Scientific-Atlanta suggests.

[16] Scientific-Atlanta Comments at 11, n.12.

[17] *Transponder Sales Order*, 90 FCC 2d at 1251-52.

[18] *Id.* at 1256.

[19] Scientific-Atlanta Reply at 14.

[20] *See Transponder Sales Order*, 90 FCC 2d at 1255 ("additional noncommon carrier satellites will not be authorized if it should develop that their certification would not inure to the public interest . . . for example, if we find that additional transponders are required for users who need common carrier service"). In this regard, Scientific-Atlanta's primary concern involves Hughes's offerings on SBS-4. This satellite is expected to reach its end-of-service life in the next few years. If Hughes seeks to replace the satellite, it should file an application shortly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GEOSTAR	File Nos. 407-DSS-MP/ML-89
POSITIONING	408-DSS-MP/ML-89
CORPORATION	409-DSS-MP/ML-89

Application to Modify
Space Station Authorizations
in the Radiodetermination
Satellite Service

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 1990; Released: March 14, 1990

By the Commission:

1. Geostar Positioning Corporation (Geostar) is authorized to construct, launch and operate three satellites in the Radiodetermination Satellite Service (RDSS).[1] Geostar requests that these authorizations be modified to increase the amount of authorized bandwidth in the 6.5 GHz band for the transmission link from the ground control center to the satellites. As is discussed below, this order waives in part Section 25.202(a)(2) of the Commission's rules, 47 C.F.R. § 25.202(a)(2), and grants the requested modifications.

2. RDSS systems are assigned two sets of frequencies in order to establish communication via satellite between a ground control center and an end user. Communications between the user and the satellite are assigned to the 1610-1626.5 MHz (uplink) and 2483.5-2500 MHz (downlink) bands. Communications between the control center and the satellite (feeder links) are assigned to the 5150-5216 MHz (downlink)[2] and 6525-6541.5 MHz (uplink) bands. *See* 47 C.F.R. § 25.202(a)(2). Geostar wants to increase the authorized bandwidth for the control center-to-satellite uplink to include the 6525-6606.625 MHz band. Geostar claims the increased bandwidth will allow it to simplify the design and to reduce the cost of the satellites.

3. Using the currently authorized 6525-6541.5 MHz feeder link band, Geostar's RDSS satellite design would provide one wideband data channel and one narrowband command and ranging channel. The wideband data channel is designed to transmit as a single time division multiplexed (TDM) signal that includes all of the timing and interrogation signals, computed position data, and ancillary messages for retransmission to the end users at 2.5 GHz (satellite-to-user downlink). On-board the satellite, the data would have to be demodulated, demultiplexed, switched and routed to the correct downlink stream. For retransmission at 2.5 GHz, the data then would have to be remultiplexed and remodulated. In addition, timing reference information and pseudorandom noise codes would have to be incorporated in order to generate the spread spectrum signals. [3] All of these functions would be performed by a baseband processor on-board the satellite. The on-board processor would operate with an acquisition aid to bridge the timing reference and pseudorandom noise code generators. Geostar asserts that, once the satellites were launched, these complex interactive functions that would be performed by the acquisition aid could not be reprogrammed.[4]

4. Geostar proposes to eliminate on-board signal processing and to use instead on-ground signal processing and conventional frequency changing transponders on the satellites. This change will allow direct correspondence between the signals transmitted by the central earth station at 6.5 GHz and the receiving user terminals at 2.5 GHz. The current satellite design already provides for eight spot beams, each having a 16.5 MHz channel for the satellite to mobile unit downlink transmissions at 2483.5-2500 MHz (one channel for each of the eight spot beams). With the additional bandwidth that it seeks at 6525-6606.625 MHz, Geostar would divide the spectrum into eight overlapping dual polarized 16.5 MHz channels for control center to satellite uplink transmissions, thus providing one uplink channel in the 6.5 GHz band for each downlink channel in the 2.5 GHz band.[5] One 3 MHz segment (single polarization) at 6525-6528 MHz would be used for telecommand and frequency reference pilot transmissions.

5. Geostar cites several advantages in eliminating on-board signal processing. It would have the flexibility to incorporate changes in spread spectrum techniques, such as changing the type of acquisition aid used or adding new pseudorandom noise codes if the equipment for processing signals were located on the ground. In addition, the modified satellite design will cost less. Geostar argues that these changes will allow it to provide more efficient and economical service to the public. Geostar also asserts that increasing the 6.5 GHz bandwidth for the central control to satellite uplink transmissions is reasonable. It argues that the amount of additional bandwidth sought is not excessive and would not adversely impact future use of the band by other domestic satellite systems.

6. American Mobile Satellite Consortium, Inc. (AMSC) has filed comments on Geostar's applications.[6] AMSC asserts that Geostar provides insufficient information to determine whether the elimination of on-board signal processing will affect the quality and integrity of service. AMSC also disagrees with Geostar's assertion that the acquisition aid for the on-board processor cannot be reprogrammed by ground commands after launch. Further, AMSC questions whether Geostar's purpose in requesting increased 6.5 GHz capacity is to provide fixed-satellite services, independent of its position location service. To support this allegation, AMSC cites several press reports that Geostar plans to offer a fixed low-speed data service using L-band terminals.[7] AMSC alleges that the provision of fixed service would be inconsistent with Section 25.392(d) of the Commission's rules, 47 C.F.R. § 25.392(d), which provides that RDSS systems may not offer other services except as ancillary to RDSS.[8] AMSC argues that, under this requirement, any low-speed data service must be related to the provision of radiodetermination service and cannot be offered as an independent fixed-service.[9] AMSC also argues that it would be inconsistent with Commission technical and regulatory policies to allow RDSS systems to provide independent fixed-satellite services. AMSC alleges that service limitations were imposed for RDSS in order to allow

multiple systems to operate using spread spectrum transmission techniques, and that expanded service offerings could hinder the entry of other RDSS systems.[10] AMSC also alleges that since fixed-satellite data services currently are provided on a common carrier basis by domestic fixed-satellite operators, these services should not be provided under the RDSS non-common carrier regulatory structure.

7. In reply, Geostar asserts that the requested feeder link and satellite design modification will not impair the system's performance quality or hinder the entry of other RDSS systems. The applicant asserts that spread spectrum signals, even though they will be processed on the ground rather than on-board the satellite, will fit within the carrier-to-noise ratios that it specified in its approved application for both the 6.5 GHz uplink transmissions and the 2.5 GHz outbound transmissions. Because there will be no change in the basic spread spectrum signal processing procedures, Geostar claims that the licensing of additional RDSS systems will not be impaired. In addition, Geostar asserts that AMSC has no basis for alleging that the proposed system modifications will result in a violation of RDSS regulations concerning service offerings. In this regard, Geostar claims that the Commission's rules do not restrict the types of user terminals permitted in RDSS systems and that Geostar's system now uses fixed terminals as benchmarks to calibrate the system. Geostar also notes that the low-speed data service cited by AMSC is functionally identical to other potential two-way data transfer applications of RDSS.[11]

8. AMSC, responding to Geostar's reply, observes that Geostar has provided no technical information to support its assertion that the requested system modifications will not impair system performance. AMSC also argues that Geostar mischaracterizes the issue of permissible service offerings for RDSS systems by arguing that it now uses fixed terminals for system management. AMSC contends that Geostar is unresponsive to the issues raised regarding multiple entry and regulatory structure if independent fixed-satellite services were provided by RDSS systems.

DISCUSSION

9. Under Section 25.202(a)(2) of the Commission's rules, the 6525-6541.5 MHz band is allocated for RDSS feeder link transmissions from the ground control center to the satellites.[12] Geostar's request to use additional spectrum from 6525-6606.25 MHz requires a partial waiver of our allocation rule.[13]

10. When considering the waiver of a Commission rule, we have an obligation to seek out the public interest in the particular case and to consider hardship, equity or more effective implementation of overall policy in our evaluation.[14] For RDSS, we had proposed to allocate only 16.5 MHz of spectrum in the 6 GHz band for ground to satellite system communications.[15] We evaluated the authorized usage of the 6425-7075 MHz band in order to identify a suitable 16.5 MHz segment for RDSS use. We proposed the 6525-6541.5 MHz segment because it was less congested than other portions of the band and was allocated only to fixed services, both terrestrial and satellite systems.[16] Under these circumstances, we expected that the RDSS earth stations could be successfully coordinated with the fixed (terrestrial) links operating in the band by using the coordination procedures prescribed by Part 25 of our rules.[17]

11. Geostar's request to use additional spectrum in the 6.5 GHz band is consistent with the policy underlying our original allocation decision. The 16.5 MHz segment allocated for RDSS feeder links is a small portion of a broader spectrum range that is allocated to both fixed and fixed-satellite services -- *i.e.*, 6525-6875 MHz. The additional spectrum sought by Geostar falls well within this range, and no new class of fixed users will be affected.[18] Moreover, Geostar plans only one central earth station for its RDSS network,[19] and it can continue to be coordinated under Part 25 procedures. In addition, we find that fixed-satellite use of the frequency band will not be impaired by granting Geostar's request. We do not currently assign these frequencies for use by the domestic fixed-satellite service, and those frequencies included in the international fixed-satellite service allotment plan[20] will not be affected.

12. Geostar asserts that the modified satellite design resulting from the increased feeder link bandwidth will serve the public interest by allowing for more efficient and economical service. By eliminating on-board signal processing, and instead having this function accomplished by equipment on the ground, Geostar will be able to incorporate into its system newer technology for spread spectrum signal processing as it develops, and the satellite construction costs will be reduced. We agree with Geostar that these changes ultimately should benefit the public.[21]

13. AMSC asserts that Geostar has not demonstrated that the elimination of on-board signal processing will not affect the quality and integrity of service. We believe that the record does not support this allegation. Geostar has not proposed to alter the operational characteristics of the spread spectrum signals to be transmitted, only to process those signals on the ground rather than on-board the satellite. Indeed, Geostar responds to AMSC's allegation by noting that the signals generated by the modified system design will fit within the carrier-to-noise ratios currently specified for its system. Moreover, AMSC offers no reason why Geostar would attempt to degrade its own service offerings. Thus, we believe that Geostar will maintain quality service under the modified system design.

14. We also find that a partial wavier of Section 25.202(a)(2) will provide for more effective implementation of policy in this area. When the Commission initiated a proceeding in 1984 to allocate spectrum for RDSS, we based our proposals on a petition and a proposed satellite system design filed by Geostar. Of the four frequency bands proposed, only the 6.5 GHz band for feeder link operations did not require a modification to the Table of Frequency Allocations in Part 2 of the Commission's Rules, 47 C.F.R. § 2.106, because those operations are allowed by definition in spectrum allocated to fixed-satellite services. We had proposed that only 16.5 MHz of FSS bandwidth be assigned for RDSS feeder links at 6.5 GHz based on Geostar's proposed satellite system design that provided for on-board signal processing. We now believe that this sub-allocation of FSS frequencies for RDSS feeder link operations is unduly restrictive in this case. The sub-allocation limits the options for the design of Geostar's satellite system (*e.g.*, on-board signal processing) unless it seeks a waiver of our rule. In addition, we have not codified a sub-allocation of FSS frequencies for Mobile-Satellite Service (MSS) feeder link operations, relying instead on general guidelines for applicants to use in applying for sub-bands in FSS frequency bands for their feeder link operations.[22] We believe that, consistent with

this approach, Geostar should have the flexibility to apply for whatever spectrum is needed at 6525-6725 MHz for feeder links operations, consistent with its overall satellite system design.

15. As an additional matter, the record does not support AMSC's allegation that Geostar will use the increased bandwidth at 6.5 GHz to provide independent fixed-satellite service. The only support cited by AMSC to substantiate its allegation are press reports regarding fixed terminals using L-band frequencies. Geostar's application represents that the use of the 6.5 GHz spectrum is consistent with the Commission's purpose in assigning FSS spectrum for feeder link transmissions in RDSS systems. The FSS bands are assigned for transmission links between ground control and the satellite merely to complete the communication link between the end user and the ground control. They are used in conjunction with the assigned L-band frequencies for satellite-end user transmission links, and they are not intended to be used independently to provide separate fixed-satellite services.[23] In Geostar's modified system design, there will be a direct one-to-one correspondence between the 6.5 GHz feeder link channels and the 2.5 GHz out-bound channels. By using conventional frequency changing transponders on the satellite, the communication link between ground control and the end user will be established consistent with our policies. The increased bandwidth for feeder link operations will facilitate Geostar's ability to provide radiodetermination services. Moreover, in its application, Geostar does not seek permission to provide separate fixed-satellite services, nor does it claim that it will do so, as a result of obtaining the additional 6.5 GHz spectrum that we are authorizing.[24] If Geostar plans to provide non-ancillary fixed-satellite services, it must file an application to do so.[25]

16. In conclusion, we find that a partial waiver of Section 25.202(a)(2) is warranted in this case. We also find, pursuant to 47 U.S.C. § 309, that grant of this application will serve the public interest, convenience and necessity.

ORDERING CLAUSE

17. ACCORDINGLY, IT IS ORDERED that the applications of Geostar Positioning Corporation (File Nos. 407-DSS-MP/ML-89; 408-DSS-MP/ML-89; 409-DSS-MP/ML-89) ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* Geostar Corporation, Mimeo No. 6144 (August 7, 1986). The Commission's rules define "radiodetermination" as the determination of position, or the obtaining of information relating to position, by means of the propagation properties of radio waves. *See* 47 C.F.R. § 2.1.

[2] The Commission recently changed the allocation for the satellite-to-control center transmissions (downlink) to the 5150-5216 MHz band in order to reflect revisions to the international Radio Regulations. *See* Amendment of Parts 2, 25, 80 and 87 of the Commission's Rules regarding implementation of the Final Acts of the World Administrative Radio Conference for the Mobile Services, Geneva, 1987, General Docket No. 89-103, 4 FCC Rcd 7603 (1989). Previously, the Commission's rules assigned RDSS systems, such as Geostar's, to the 5117-5183.0 MHz band. Geostar's modification application indicates that, in the future, it intends to request authority to modify its RDSS authorizations to conform the 5 GHz downlink frequencies to this allocation change.

[3] With spread spectrum transmissions, multiple messages are transmitted at the same time and at the same frequency, but the signals are separated by modulating them with unique pseudorandom noise codes. Users generally access the system on a random basis at different instants of time.

[4] Geostar acknowledges that other on-board digital processing -- *e.g.*, standard filtering algorithms -- can be reprogrammed after launch.

[5] Geostar also proposes to have 1.25 MHz of guardband between the 16.5 MHz channels, resulting in 17.75 MHz of separation between channel center frequencies. The additional spectrum requested by Geostar includes the amount needed for channel guardbands.

[6] Geostar's applications were put on public notice (Report No. DS-809) on December 28, 1988. In addition, AMSC has changed its name to American Mobile Satellite Corporation.

[7] AMSC cites Pipeline and Gas Journal, October 1988, pp. 12-14, and Mobile Satellite Reports, January 14, 1989, pp. 4-5.

[8] Section 25.392(d) provides: "Permissible communications. Stations in this service are authorized to render radiodetermination service, and may not render other services except as ancillary to the radiodetermination service."

[9] AMSC also claims that Geostar would be acting inconsistently if it argues that its RDSS system can provide a separate low-speed data service as ancillary to the radiodetermination service when Geostar has proposed a similar low speed data service in the 1530-1544 MHz/1626.5-1645.5 MHz bands that it acknowledges is not related to RDSS, and cites Geostar Messaging Corporation, Petition for Rule Making, RM-6459 (June 16, 1988).

[10] *See* RDSS Licensing Order, General Docket No. 84-690, 104 FCC 2d 650, paras. 14-21 (1986).

[11] In this regard, Geostar refers to the Commission's RDSS allocation order wherein we summarized commenters' proposed uses of RDSS, including land resource management functions (*e.g.*, surveying and mapping). *See* RDSS Allocation Order, General Docket No. 84-689, 58 Rad. Reg. 2d. (P&F) 1416, Appendix B (1985). Geostar's reference is to illustrative comments contained in an appendix to the allocation order, which preceded the *RDSS Licensing Order*, *see supra* note 10, whereby service rules (*e.g.*, Section 25.392(d)) were adopted.

[12] Section 25.202(a)(2) provides:

> The following frequencies are available for use by the Radiodetermination Satellite Service:

1610-1626.5 MHz:	User-to-Satellite Link
2483.5-2500 MHz:	Satellite-to-User Link

Fixed-Satellite service frequencies may be used for links between radiodetermination satellites and control centers, including the following specially allocated bands, subject to the Rules in this subpart:

5150-5216 MHz:	Satellite-to-Control Center Link
6525-6541.5 MHz:	Control Center-to-Satellite Link

[13] Although Geostar did not specifically request a waiver of Section 25.202(a)(2), the Commission can waive its rules on its own motion under 47 C.F.R. § 1.3.

[14] *See* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

[15] *See* Notice of Proposed Rule Making, General Dockets No. 84-689 and 84-690, 49 Fed. Reg. 36512 (September 18, 1984) (hereinafter "RDSS Notice").

[16] *Id.* at para. 28.

[17] *See* 47 C.F.R. § 25.203 for the coordination procedures for earth stations operating in frequency bands shared with equal rights between terrestrial and space services.

[18] All of the fixed links at 6525-6875 MHz are authorized under Part 94 of the Commission's rules that govern the Operational-Fixed Service.

[19] *See* Geostar Corporation, Mimeo No. 6144 at para. 3 (August 7, 1986).

[20] The international allotment plan includes the 6725-7025 MHz portion of this band. *See* ITU, Space WARC Final Acts, Appendix 30B (Geneva, 1988).

[21] The question raised by AMSC whether the acquisition aid can be reprogrammed by ground commands after launch need not be addressed in light of our finding that the public interest would be served by locating the signal processing function on the ground.

[22] *See* MSS Licensing Policies Order, General Docket No. 87-1234, 2 FCC Rcd 485, para. 30 (1987), *on reconsideration*, 4 FCC Rcd 6029 (1989). Indeed, MSS applicants could have applied for spectrum for feeder link operations in the same 6.5 GHz band used by RDSS. However, unlike RDSS applicants, MSS applicants were not restricted as to the amount of spectrum for which they could apply.

[23] *See* RDSS Notice, *supra* note 15, at paras. 10-13 for a description of the two-way communication path from ground control to end user using both C-band and L-band frequencies. *See also* 47 C.F.R. § 2.106, US 307 (the band 5117-5183 MHz is allocated for feeder link use in conjunction with RDSS systems operating in the 1.6/2.5 GHz bands).

[24] In this regard, we find that the use of fixed terminals as a benchmark to calibrate the RDSS system's operations, as noted by Geostar, applies only to internal management of the RDSS system. Service to the public is regulated under 47 C.F.R. § 25.392(d). *See* supra note 8.

[25] Consequently, it would be premature for us to address here the issues raised by AMSC regarding permissible service offerings, multiple entry and regulatory oversight of RDSS if non-ancillary fixed-satellite services were provided by RDSS systems. Further, if AMSC wants to pursue the issue of permissible ancillary services under § 25.392(d), it may seek clarification of the rule in a separate petition.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-76

Amendment of Part 22 of the
Commission's Rules to require the
Prior Coordination of Public Land
Mobile Service applications.

NOTICE OF PROPOSED RULE MAKING

Adopted: February 15, 1990; Released: March 15, 1990

By the Commission:

1. We hereby propose to amend Part 22 of our rules to require all potential applicants for Public Land Mobile Service (PLMS) facilities to coordinate their proposed frequency usage with existing users of the same frequency and with other applicants with earlier filed applications for the same frequency prior to filing their applications with the Commission.

I. BACKGROUND

2. The existing rules require PLMS applicants to include as a part of their applications interference studies that demonstrate that the proposed facilities will not cause harmful electrical interference to those co-channel facilities (existing or proposed) located within certain specified distances from the proposed facility. 47 C.F.R. Section 22.15. When a PLMS application is received by the Common Carrier Bureau it is placed on public notice and interested parties have thirty days to file petitions to deny the application. 47 C.F.R. Section 22.30. Mutually exclusive applications may be filed within 60 days of the public notice date. 47 C.F.R. Section 22.31.

3. If no petitions to deny are filed against an application and no mutually exclusive applications have been filed, the staff reviews the application to determine if the applicant has considered all required licensees and applicants in its interference analysis. If the applicant has not considered all relevant licenses or prior filed pending applications, the application is unacceptable and must be amended before it can be processed. If the application is complete, the interference study is reviewed for technical accuracy and the application is processed and granted, assuming there are no non-technical problems with the application.

4. A significant number of the petitions to deny PLMS applications are based on allegations that the proposed facility will cause co-channel interference to the petitioner's facility. In addition, the staff often discovers interference problems in processing applications when no petitions have been filed. Petitions to deny are formal pleadings usually prepared by the applicant's legal counsel with the assistance of its engineers. Oppositions to petitions to deny are filed within 10 days after the petitions are filed; a reply to the opposition may be filed 5 days after the filing of the opposition. 47 C.F.R. Section 1.45. When this process is complete the case is referred to the Mobile Services Division's legal staff which analyzes the conflicting claims with the assistance of the engineering staff and prepares an order for action by the appropriate Commission official. This initial Commission action is, in many cases, appealed to a higher Commission official. Further appeals may be taken to the full Commission and, thereafter, to a United States Court of Appeals. This process takes a long time and is expensive. It extends the time it takes to grant an application, assuming that is the result, by 2 to 6 months in the simplest case. Complicated cases can take a year or longer to resolve.

5. Applicants in the Domestic Public Fixed Radio Services are required to undertake prior coordination of their frequency proposals. Section 21.100(d) of the Commission's rules provides that proposed frequency usage shall be coordinated with existing users in the area and other applicants with previously filed applications, whose facilities could affect or be affected by the new proposal in terms of frequency interference or restricted ultimate system capacity. The coordination must be completed prior to filing an application for regular authorization, or an amendment to a pending application or a modification to a license when the proposed change is defined as "major" by the rules governing the service or is one reasonably expected to cause interference in excess of permissible levels for the service(s) involved.

6. Section 21.100(d) was originally adopted by the Commission in 1971. *Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service*, Docket No. 18920, 29 F.C.C. 2d 870 (1971). In adopting the rule the Commission expressed its belief that the "procedure [would] not only reduce the frequency conflicts that lead to the filing of petitions to deny applications, but [would] also enable the various carriers to use the limited frequencies more effectively in their particular areas of operation." *Id.* at 930. When it revised Part 21 in 1987, the Commission noted that "[b]y requiring prior coordination [it] has reduced the number of contested applications and promoted spectrum efficiency." *Revision of Part 21 of the Commission's Rules*, 2 FCC Rcd. 5712, 5715 (1987). In making these revisions the Commission also noted that 21.100(d), in addition to being used in the Point-to-Point Microwave and the Local Television Transmission Services governed by Part 21, was also used in the Fixed Satellite Service (Part 25), the Television Broadcast Auxiliary Service (Part 74) and the Private Operational Fixed Microwave Service (Part 94). *Id.* at 5714.

7. More than one million point-to-point facilities have been authorized using this procedure with virtually no problems. In most cases there are no petitions to deny filed against these coordinated applications. Few such applications are mutually exclusive with other applications. Thus, in most cases these applications are granted within 60 days of receipt. This contrasts with approximately 6 months between the receipt and grant of an uncontested PLMS application.

II. DISCUSSION

8. After reviewing our experiences processing applications using Section 21.100(d) and comparing them to our experience in processing PLMS applications using existing Part 22 procedures we have tentatively concluded that

requiring the prior coordination of PLMS applications would result in the more rapid processing of these applications. We have reached this tentative conclusion because our experience shows that the prior coordination process results in fewer petitions to deny being filed and the receipt of applications of a higher technical quality.

9. The reason the coordination process results in the filing of fewer petitions to deny being filed is that it eliminates many technical problems that would result in petitions to deny if the existing Part 22 procedures were used. An applicant using the 21.100(d) procedures learns of the interference concerns of an existing licensee when it tries to coordinate its proposal. In many cases the interference problem can be solved by minor technical changes that are resolved between the respective engineers involved. The same technical result would be achieved using the Part 22 Petition to Deny procedures except that the resolution often involves the applicant's and the licensee's legal advisors and engineers, as well as the Commission's legal and technical staff. There is little doubt that the 21.100(d) procedure is less time consuming and less costly than is a legal proceeding for the applicants, existing licensees and the Commission.[1]

10. Even in the absence of a petition to deny, we often discover potential interference problems during the processing of an application. When an interference problem appears the Commission's staff contacts the applicant and requests that it take the necessary steps to eliminate the potential interference. The applicant either modifies its proposal or explains why the interference will not occur. With prior coordination this time consuming back and forth communication will be unnecessary. Moreover, our experience processing Domestic Public Fixed Radio Service applications demonstrates that with prior coordination staff engineers need not devote their time to the study of an applicant's engineering proposal in order to determine whether interference would be caused by the proposal. Instead, it is usually only necessary to review the applications to assure that the prior coordination has been completed. The Mobile Services Division receives approximately 6,000 Public Land Mobile Services applications per year and it is anticipated that prior coordination will result in a substantial savings of staff resources.

11. The proposed coordination rules require potential PLMS applicants to select sites and frequencies so that their new facility will not cause co-channel interference to existing licensees (or prior applicants). The potential applicant must provide existing users and applicants with prior filed applications with notice of its technical proposal. Those notified are required to respond within 30 days and indicate whether there are problems with the proposal. Applicants and licensees are expected to cooperate with each other in an effort to eliminate problems and conflicts. Upon completion of coordination the applicant may file its application within six months of the date coordination was initiated. If, even after coordination, there are unresolved technical problems, the applicant must include a statement with its application explaining the reason for the unresolved conflicts.[2]

12. We recognize that if our proposal is adopted it would take longer to prepare a PLMS application and in some cases the application preparation costs at the start of the process might increase. However, we believe the decrease in costs to the applicant that would result from the anticipated decrease in the number of petitions to deny that would be filed using prior coordination would more than compensate for whatever increased costs are incurred using the proposed filing method. We also believe that the anticipated large decrease in the processing time would result in an overall cost saving to the applicants.

13. We propose to amend Subpart G - Public Land Mobile Service by adding a new section, Section 22.528 to that subpart. The proposed new Section 22.528 is modelled on existing Section 21.100(d) discussed above.[3] By proposing to add this section to subpart G of Part 22 we propose to require prior coordination only of applicants for the frequencies contained in that subpart with certain exceptions. Applicants for certain subpart G frequencies must provide 70 mile separation to other users of their frequencies and, therefore, we do not believe that coordination is necessary. On the other hand, because Rural Radio licensees use the same frequencies as subpart G licensees we propose to require applicants in the Rural Radio Service to coordinate, and we propose to amend subpart H to add a new section, Section 22.611. We specifically request comment on whether there are any other frequencies within subpart G to which the prior coordination procedures should not apply and on whether, in addition to Rural Radio, there are any Part 22 services other than the subpart G services to which the prior coordination requirement should apply. Comment is also requested on our proposal to exclude from coordination requirements the subpart G applicants who are required to provide 70 mile separation. Because of the fact that Section 21.100(d) is primarily for point-to-point services we also specifically request comment on whether any portion of the proposed Section 22.528 needs to be modified to reflect the different nature of the Part 22 services involved. The proposed Sections 22.528 and 22.611 are contained in the appendix to this proposal.

III. REGULATORY FLEXIBILITY ACT- INITIAL ANALYSIS

14. *Reason for action and objectives.* The Commission is initiating this proceeding to determine whether the use of the prior coordination procedures of Section 21.100(d) would result in decreased cost to PLMS applicants and the more rapid processing of PLMS applications.

15. *Legal Basis.* The authority for this proposed Rule Making is contained in Sections 1, 4(i), 301 and 303 of the Communications Act of 1934, as amended.

16. *Small entities affected and potential impact.* A number of the entities that would be affected by the proposed rule change are small Radio Common Carrier (RCCs). The proposed action could result in increased filing costs to all PLMS applicants including small RCCs. However, we believe that the net result of the proposed action will be an overall decrease in the cost of obtaining a PLMS authorization and a decrease in the amount of time it takes to obtain such an authorization.

17. *Federal rules which overlay, duplicate, or conflict with this* action. None.

18. *Reporting, record-keeping and compliance requirements.* None.

19. *Specific alternatives that could accomplish the same objectives.* None.

20. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any

new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act at the time any proposed rules are to become effective.

IV. EX PARTE PRESENTATIONS

21. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that ex parte presentations are permitted except during the Sunshine Agenda period. *See* generally Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, which ever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, ex parte or otherwise, are permitted by the public unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

22. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written ex parte presentation shall provide on the same day it is submitted two copies of same under separate cover to Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation.

23. Any person who in making an oral ex parte presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmttal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation. Section 1.1206.

V. ADMINISTRATIVE MATTERS

24. In accordance with the applicable procedures set forth in Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, interested parties may file comments on or before **May 7, 1990,** and reply comments on or before **May 22, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file and provided that the Commission's reliance on such information is noted in the Report and Order.

25. Interested parties shall file an original and 5 copies of all comments, replies, or other documents. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the public who wish to express their interest by participating informally in the rule making proceeding may do so by submitting one copy of the comments provided that the docket number is specified in the heading. All filings in this proceeding will available for public inspection by interested persons during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C. For general information on how to file comments, parties should contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

VI. ORDERING CLAUSES

26. Accordingly, pursuant to sections 1, 4, 313, 309(m)-(h), 405, and 412 of the Communications Act, and 5 U.S.C. § 553, this NOTICE OF PROPOSED RULE MAKING IS ADOPTED to amend 47 C.F.R. Part 22 as indicated herein.

27. The Secretary shall cause a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a) (1981). The Secretary shall also cause a summary of this Notice to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

PROPOSED RULES

Part 22 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

A. Part 22- Public Mobile Service

1. The authority citation for Part 22 continues to read:

AUTHORITY: Sections 4, 303, 48 Stat. 1066, 1083, as amended; 47 U.S.C. 154, 303.

2. Subpart G is amended by adding the following new section to read as follows:

§ 22.528 Frequency Coordination. (a) All applicants, except those listed in paragraph (b), for the frequencies contained in this subpart shall carry out the following coordination procedures.

(1) General requirements. Proposed frequency usage shall be coordinated with existing users in the area and other applicants with previously filed applications, whose facilities could affect or be affected by the new proposal in terms of frequency interference. Coordination shall be completed prior to filing an application for a new facility, an amendment to a pending application, or an application to modify a license when the proposed change is defined as "major" or is one reasonably expected to cause interference in excess of permissible levels for the service(s) involved. In engineering a system or modification thereto, the applicant shall by appropriate studies and analyses select sites, transmitters, antennas and frequencies that will avoid interference in excess of permissible levels to other users. All applicants and licensees shall cooperate fully and make reasonable efforts to resolve technical problems and conflicts that may inhibit the most effective and efficient use of the radio spectrum; however, the party being coordinated with is not obligated to suggest changes or re-engineer a proposal in cases involving conflicts. Applicants should make every reasonable effort to avoid blocking the growth of systems that are likely to need additional capacity in the foreseeable future. The applicant shall identify in the application all entities with which the technical proposal was coordinated and the dated initiated. In the event that technical problems are not resolved or if the existing licensee, or applicant does not respond to coordination efforts within 30 days after notification, an explanation shall be submitted with the application. Where technical problems are resolved by an agreement or operating arrangement between the parties that would require special procedures be taken to reduce the likelihood of interference in excess of permissible levels or would result in a reduction of quality or capacity of either system, the details thereof shall be contained in the application.

(2) Coordination procedure guidelines. The following guidelines are applicable to the coordination process.

(i) Coordination involves two separate elements: Notification and response. Both or either may be oral or in written form. To be acceptable for filing, all applications and major technical amendments must certify that coordination, including response, has been completed. The name of the parties with which coordination was accomplished must be specified.

(ii) Notification must include relevant technical details of the proposal. At minimum, this should include the information required by Section 22.15 (b) (2). As an alternative, the notification may be made by sending a completed Schedule B of FCC Form 401.

(iii) For transmitters employing digital modulation techniques at frequencies below 15 GHz, the notification should clearly identify the type of modulation. Upon request, additional details of the operating characteristics of the equipment shall also be furnished.

(iv) Response to notification should be made as quickly as possible, even if no technical problems are anticipated. Every reasonable effort should be made by all carriers to eliminate all problems and conflicts. If no response to notification is received within 30 calendar days, the applicant will be deemed to have made reasonable efforts to coordinate and may file its application without a response.

(v) The 30-day notification period is calculated from the date of receipt of the notice. If notification is by mail, this date may be ascertained by: (i) The return receipt on certified mail, (ii) the enclosure of a card to be dated and returned by the recipient, or (iii) a conservative estimate of the time required for the mail to reach its destination. In the latter case, the estimated date when the 30-day period would expire should be stated in the notification.

(vi) All technical problems that come to light during coordination must be resolved unless a statement is included with the application to the effect that the applicant is unable or unwilling to resolve the conflict and briefly the reason therefor.

(vii) Where a number of technical changes become necessary for a system during the course of coordination, an attempt should be made to minimize the number of separate notifications for these changes. Where the changes are incorporated into a completely revised notice, the items that were changed from the previous notice should be identified. When the notifying party believes a shorter response time is reasonable and appropriate, because the changes are not numerous or complex, it may suggest a reasonable response date in the notice and the responding carriers will be expected to make a good faith effort to respond by the date suggested.

(viii) If, after initial coordination, it is determined that a subsequent change could have no impact on some parties receiving the original notification, it is not necessary to coordinate the change with them. However, these parties shall be notified of the changes and the opinion that coordination is not required for such change.

(ix) Applicants, permittees and licensees must supply to all other applicants, permittees and licensees, whose operation or proposed operation may be affected by their own, the name, address and telephone number of their coordination representatives. Upon request from coordinating applicants, permittees and licensees, data and information concerning existing or proposed facilities in the area of interest should be furnished unless such request is unreasonable or would impose a significant burden in compilation.

(x) Parties should keep those with whom they are coordinating advised of deletions or changes in plans for facilities previously coordinated. If applications have not been filed 6 months after coordination was initiated, it may be assumed that such frequency use is no longer desired unless a second notification has been received within 10 days of the end of the 6 month period. Renewal notifications are to be sent to all originally notified parties, even if coordination has not been successfully completed with those parties.

(b) The following applicants are not subject to the requirements of this section:

(1) Applicants seeking authority to use the 72 to 76 MHz control frequencies, the 931 MHz paging frequency or the 928, 956 and 959 control frequencies.

3. Subpart H is amended by adding the following new section to read as follows:

§22.611 Frequency Coordination. All applicants for the frequencies contained in this subpart must carry out the frequency coordination procedures specified in Section 22.528 of Subpart G.

FOOTNOTES

[1] We do not anticipate that coordination between current or potential competitors will have anti-competitive consequences. Nevertheless, in order to develop a full record with regard to the potential for any anti-competitive effects we invite comments on this issue.

[2] The text of the proposed rule is general. We are interested in commenters' views on whether more specific guidance as to when coordination is required, and if so, suggested specific language.

[3] We have eliminated certain sections and requirements contained in Section 21.100(d) that are clearly not applicable to Part 22 facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-353

In re Applications of

PERRY TELEVISION, INC. File No. BPCT-870317KH

RADIO PERRY, INC. File No. BPCT-870317KI

For Construction Permit for a New Television Station at Perry, Georgia

Appearances

Seymour M. Chase, on behalf of Perry Television, Inc.; and *Eric S. Kravetz*, on behalf of Radio Perry, Inc.

DECISION

Adopted: February 8, 1990; Released: March 16, 1990

By the Review Board: BLUMENTHAL and ESBENSEN; MARINO (Chairman) not participating.

Board Member ESBENSEN:

1. The Review Board has before it the *Initial Decision*, 4 FCC Rcd 4603 (1989)(I.D.), of Administrative Law Judge Richard L. Sippel (ALJ) granting the application of Perry Television, Inc. (PTI) to establish a new television facility on Channel 58 at Perry, Georgia, and denying the competing application of Radio Perry, Inc. (RPI). In the proceeding below, the ALJ specified a real-party-in-interest issue against PTI. That issue was resolved in PTI's favor by the ALJ, although he determined that resolution to be "a close call." I.D., para. 89. In addition, the ALJ determined that RPI's proposed "common ownership" of an AM-FM combination, and the television station at issue here, would not be in the public interest. *Id.*, para. 96. Finally, on a contingent basis, the ALJ determined that PTI prevailed over RPI on the standard comparative issue. *Id.*, para. 101.

2. Each applicant has filed exceptions and reply briefs; however, neither applicant requested oral argument. Although we basically agree with (and adopt) the ALJ's findings of fact, based upon our review of the pleadings and the hearing record below, we reverse the ALJ's ultimate conclusions, and hold (1) that PTI is disqualified pursuant to the real-party-in-interest issue; (2) that RPI's proposed common ownership of the subject television station and its Stations WPGA(AM) and WPGA-FM, Perry, Georgia, would not be antithetical to the public interest; and (3) that RPI's application should be granted.

PTI REAL-PARTY-IN-INTEREST ISSUE

3. *Background:* By *Memorandum Opinion and Order*, FCC 88M-1709, released June 2, 1988, the ALJ added the following issues against PTI:

> A. To determine whether David Pierce and/or James Geiger is a real-party-in-interest in Perry Television, Inc. and, if so, whether Perry Television, Inc. is qualified to become a Commission licensee.
>
> B. To determine whether Perry Television, Inc. misrepresented or was lacking in candor in its proposal to the Commission in in its application Form 301 which failed to disclose that David Pierce and/or James Geiger was a real-party-in-interest and, if so, whether Perry Television, Inc. is qualified to become a Commission licensee.

4. In examining these issues, the ALJ analyzed the hearing testimony of: (1) all five of PTI's current "voting" shareholders (Hevia M. Ingram (14% voting shareholder, owning 7% equity in PTI); Lorna Cabasares (31% voting, 15.5% equity); Veronica Denise Ingram (31% voting, 15.5% equity); Alexander Dy (10% voting, 5% equity); and Catherine H. Ingram (14% voting, 7% equity)); (2) PTI's local counsel, David Pierce and James Geiger, partners in the Perry law firm Geiger and Pierce; (3) both "non-voting" stockholders, Susan D. Pierce (25% equity) and Paula H. Geiger (25% equity), who are the respective spouses of PTI's local counsel; and (4) PTI's communications counsel, Seymour M. Chase. *See* I.D. paras. 11-39. Based on this evidence, the ALJ principally concluded that David Pierce, James Geiger, and Seymour Chase served as promoters of PTI, with Pierce controlling the March 17, 1987 incorporation of PTI, the recruitment of voting shareholders, the obtaining of a tower site on land owned by Geiger and Pierce, the obtaining of a bank letter, and the drafting of PTI's Articles of Incorporation. *Id.*, paras. 19, 81. He further found that attorneys Pierce and Geiger utilized their spouses to fulfill their aim of covertly investing in the applicant. *Id.*, paras. 35, 82-86. The ALJ also concluded that attorneys Pierce and Geiger financed the applicant and retained control of PTI through the time the proceeding was designated for hearing in September 1987. *Id.*, para. 36. Despite these findings, the ALJ ultimately resolved the real-party-in-interest and related misrepresentation issues in favor of PTI, stating that although the record showed that Pierce and Geiger "exercised . . . dominion and control" over the PTI application, *id.*, para. 88, neither Pierce nor Geiger (nor their spouses) were shown to have any interest in actually controlling the operation of the proposed station, and that no intent to deceive the Commission was demonstrated. *Id.*, para. 89.

5. *Discussion*: We affirm the ALJ's findings of fact and his mediate conclusions insofar as they determine that Pierce and Geiger exercised dominion and control over PTI. However, agreeing with RPI (Br. at 36-42) that the ALJ's ultimate conclusion is legally erroneous, we hold that the totality of record evidence demonstrates that Pierce and Geiger are, in fact, "real-parties-in-interest" to the PTI application.

6. The test for determining whether a third person is a real-party-in-interest is "whether that person has an ownership interest, or is or will be in a position to actually or potentially control the operation of the station." *KOWL*,

Inc., 49 FCC 2d 962, 964 (Rev.Bd. 1974); *accord, San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987). The critical and undisputed record facts are as follows: The PTI application was initiated in February 1987, when Chase telephoned Geiger requesting his assistance in forming a local group to file a Perry television application. I.D., para. 12; Tr. 646. In that call, Chase explained the Commission's comparative process, including the credit awarded for integrated owners with female and minority enhancements, the need for an antenna site, and the need to procure financing to cover what Chase estimated to be costs of $3-3.5 million to construct and operate the station for three months. I.D., para. 13. Thereafter, Geiger discussed the project with Pierce, his law partner, and they agreed to proceed, with Pierce "atten[ding] to what was called for" and paying Chase's retainer from the law firm's "investment account." *Id.* Pierce proceeded to (1) recruit the "voting" stockholders from his friends and acquaintances in Perry, *id.*, para. 13; (2) obtain a bank commitment letter, *id.*, para. 14; (3) make available land which he and Geiger owned for the applicant's transmitter site, *id.*, para. 15; and (4) draft PTI's articles of incorporation, which included on behalf of the "non-voting" shareholders highly favorable redemption privileges supported by a "sinking fund." *Id.*, paras. 17-18. However, the costs for construction and operation of the station (estimated at $3-3.5 million) were not disclosed to the original "voting" shareholders prior to their enlistment in PTI. *Id.*, para. 14. And, when one of those shareholders (Quentin C. Harvey) could not be reached only one day preceding the Commission's application filing deadline, Pierce recruited an additional "voting" shareholder, Veronica Denise Ingram, who was offered half of Harvey's original 80% equity share, *sans* Harvey's prior knowledge. *Id.*, para. 14; Tr. 689-91, 695. On the following day, March 17, 1987, Ingram signed the application and site certification after scanning the application and corporate documents and discussing the matter with Chase. Chase then filed the application. I.D., para. 15.

7. When the PTI application was filed on March 17, 1987, PTI had no "non-voting" stockholders. However, after considering becoming "non-voting" stockholders themselves, but realizing that "ethical considerations" militated against investing in clients involved in litigation, and further realizing that Commission precedent could weaken the comparative posture of an applicant whose purportedly passive principals include attorneys involved in the applicant's media activities,[1] attorneys Pierce and Geiger decided not to invest directly in PTI. Instead, they offered the investment opportunity to their wives, who, on April 16, 1987, became PTI's "non-voting" stockholders. I.D., paras. 19-23, 26, 35 & n. 4. These investments were each made with funds jointly owned by each husband-wife dyad, respectively, and the wives completely deferred to Pierce and Geiger on these investments (as they had done with respect to previous business matters). *Id.*

8. While the use of joint funds is not necessarily determinative of intended joint operation, *Richard P. Bott, II*, 4 FCC Rcd 4924, 4928 (Rev. Bd. 1989), there are several additional facts supporting the ALJ's finding (I.D., para. 82) that Pierce and Geiger are "co-investors" with their spouses in PTI. For example, both in *Bott* and here, the putative non-owner spouse informed the owner-spouse about the investment opportunity, arranged financing for the station, and joint assets were used. In addition, whereas in *Bott* the owner-spouse used the legal and engineering counsel regularly retained by the non-owner spouse, and both spouses participated in discussions with counsel and in selecting station personnel, here the owner-spouses were even less involved, because their husbands *are* the counsel, and attorney Pierce (along with communications counsel) was directly responsible for establishing the corporate structure and assigning corporate and station management roles. *Cf. N.E.O. Broadcasting Co.*, 103 FCC 2d 1031, 1035 (Rev.Bd. 1986) (applicant's claim that wife was sole owner is not credible, but instead is "mere facade to obfuscate [husband's] *de facto* control").

9. While the above-described pre-organizational activities and control of Pierce and Geiger are "not necessarily dispositive" of whether PTI, once established, will be secretly managed by them, these activities and control are nevertheless relevant to a resolution of this issue in accordance with "the totality of record evidence." *See Renee Marie Kramer*, FCC 90R-7, released January 29, 1990, at para. 9 (citing *Susan S. Mulkey*, 4 FCC Rcd 5520, 5520-21 (1989); and *Magdalene Gunden Partnership*, 3 FCC Rcd 7186 (1988)). Furthermore, the record here also shows that Pierce and Geiger did not cease to be involved once PTI was formed. For example, after the FAA determined that PTI's original transmitter site was an air hazard, Pierce was requested to locate an alternative site and did so. *Id.*, para. 29. Also, Pierce and Geiger advanced the funds necessary to cover all of PTI's pre-hearing expenses (including the Commission's $6,000 hearing fee). *Id.*, para. 36. Finally, Pierce and Geiger, without any substantial involvement by, or consultation with, PTI's nominal owners, participated in, and controlled, preliminary settlement discussions held on September 23 and October 15, 1987, with RPI's sole principal. *Id.*, paras. 38-40. In sum, the total record evidence reveals that all of PTI's significant decisions and activities were controlled by attorneys Pierce and Geiger, and that they have been at all times the moving force behind the PTI application, exerting dominion and control over PTI from its inception and throughout the hearing. Thus, we find no basis for inferring other than that they would continue to do so if PTI were to become the permittee. *See Bellingham TV Associates, Ltd.*, 103 FCC 2d 222, 224 (Rev. Bd. 1986)(applicant disqualified for misrepresenting that a principal was not the moving force and real-party-in-interest behind a related application).

10. We also reject PTI's particularized exceptions with respect to this issue. *See* PTI Br. at 12-37. First, PTI challenges the ALJ's view that PTI's articles of incorporation (drafted by Pierce) contain specific provisions affording the "non-voting" stockholders unusually strong protections and benefits and, therefore, are suggestive of an over-reaching control by Pierce and Geiger. *Id.*, at 13-21. Instead, PTI claims that the provisions are of the type that have been held in previous cases to afford reasonable protection to non-voting investors without impinging on the abilities of voting shareholders to control and manage the station. *Id.*, at 19-21 (citing *Marrow Enterprises, Inc.*, 102 FCC 2d 342, 347-348 (ALJ), *aff'd*, 102 FCC 2d 334, 340 (Rev.Bd. 1985); *Pentecostal Revival Association, Inc.*, 1 FCC Rcd 842, 842-843 (Rev. Bd. 1986)). We disagree. In addition to some of the archetypal protections afforded to "non-voting" (or "preferred") stockholders, the articles of incorporation contain strong additional protections that were drafted by Pierce and were not subject to arms-length negotiation with the "vo-

ting" stockholders. In particular, although the "non-voting" stock (as well as the "voting" stock) has a $10 per share par value, the articles of incorporation make the "non-voting" shares redeemable in 1992 or later, or at anytime upon liquidation or dissolution of PTI, at a redemption price of $150 per share. To further protect the "non-voting" stockholders, PTI is required to establish a "sinking fund" to be used to redeem the non-voting stock. *I.D.*, para. 17. The ALJ properly observed that these provisions provide the "non-voting" stockholders maximum protection and were drafted without any negotiated understanding of the "voting" stockholders, and therefore constituted additional circumstantial evidence supporting the conclusion that Pierce and Geiger exerted dominion and control over PTI. *See id.*, paras. 18, 86-87.

11. PTI also urges that the above protective provisions were not designed purely to benefit Pierce, Geiger, or their spouses, because it was not decided until after PTI was incorporated, and its application filed, that the spouses would become "non-voting" stockholders. PTI Br. at 22-32; PTI Reply at 17. We reject this argument. The record evidence establishes that Pierce and Geiger had in mind, from the time that they agreed to participate in organizing PTI, that they would invest in some manner in PTI. *I.D.*, para. 19. Once Pierce and Geiger discussed the question of their direct investment in PTI with Chase, but decided that they could not do so because of purported "ethical considerations," they immediately set about enlisting their wives as "non-voting" stockholders. *Id.*, paras. 17, 20-23, 82. Therefore, it is likely that the protective provisions in the articles of incorporation were designed by Pierce with the forethought of protecting the investment that he and Geiger intended later to make.

12. Finally, it is also noteworthy that PTI does not even allege any significant activities in pursuit of the application by the "voting" stockholders, but only that those shareholders are *capable* of running a business, that Veronica Denise Ingram (who signed the application on March 17, 1987 after only being recruited the day before) read the application and associated documents (and asked Chase "some" questions relating thereto) before signing them, and that Pierce obtained the amended antenna site after he was requested to do so by the "voting" stockholders. PTI Br. at 35-38; PTI Reply at 9, 19-20. Nor does PTI challenge the fact that, after PTI's formation, attorneys Pierce and Geiger routinely advanced funds from their investment account for various PTI expenses, including the $6,000 hearing fee, *id.*. In sum, PTI's allegations are wholly insufficient to disturb the conclusion that Pierce and Geiger were responsible for all significant corporate decisions and activities, *id.*, para. 35. Notably, those findings were based, in part, on the ALJ's weighing of a marked lack of recollection and the presence of significant inconsistencies in the testimony of PTI's principals, *see* I.D., paras. 16, 29-31, 33, and nn. 5-8, and on demeanor evidence, *id.*, para. 26. Because the ALJ's credibility findings are not "in irreconciliable conflict with the record evidence," but, in fact, are in close harmony with it, we accord them the special deference that precedent dictates is due them. *RKO General, Inc. (WAXY-FM)*, 4 FCC Rcd 4679, 4689 (Rev. Bd. 1989) (and cases cited therein).

13. Under the specific terms of the Commission's *Ownership Attribution* policy, *supra* note 1, Pierce and Geiger could not be considered passive owners, and any equity interest they would have in PTI would have reduced PTI's integration credit. *See* 1 FCC Rcd at 804. Further, they cannot accomplish through their wives what they could not do directly. *N.E.O. Broadcasting, supra.* Moreover, because all of PTI's significant decisions and activities, both post- and pre-formational, were made by Pierce and Geiger without any substantial involvement by the "voting" stockholders, and because their spouses (the purported "non-voting" stockholders) were in actuality co-investors with them, insofar as the investments were made with joint funds and the spouses completely deferred to them on this and other business matters, *see* I.D., paras. 20-23, 82, we find that attorneys Pierce and Geiger have exercised "dominion and control" over PTI. We thus conclude that they are real-parties-in-interest in the PTI application, and that disqualification is warranted. *See Bellingham, supra.*[2]

RPI COMMON OWNERSHIP ISSUE

14. *Background*: The *Hearing Designation Order*, 2 FCC Rcd 5475 (1987)(HDO), specified a "common ownership" issue against RPI as follows:

> To determine, with respect to Radio Perry, Inc., whether its ownership of Stations WPGA(AM) and WPGA-FM, Perry, Georgia, and the proposed television station would be consistent with Section 73.3555(b) (1 and 2) of the Commission's Rules, and if not whether common ownership, operation, or control of the stations in question would be in the public interest.

47 C.F.R. §73.3555(b) generally proscribes grant of a television application where the proposed applicant already owns a radio station currently serving the proposed community of license. However, that rule also contemplates that exceptions may be made where an applicant requests a waiver supported by a valid public interest justification. Thus, Note 7 to Section 73.3555(b) provides:

> The Commission will entertain requests to waive the restrictions of paragraph (b) of this section on a case-by-case basis. The Commission will look favorably upon waiver applications that meet either of the following two standards: (1) those involving radio and television station combinations in the top 25 television markets where there will be at least 30 separately owned, operated and controlled broadcast licensees after the proposed combination, as determined by counting television licensees in the relevant ADI television market and radio licensees in the relevant television metropolitan market; or (2) those involving "failed" broadcast stations that have not been operated for a substantial period of time, *e.g.*, four months, or that are involved in bankruptcy proceedings. For the purposes of determining the top 25 ADI television markets, the relevant ADI television market and the relevant television metropolitan market for each prospective combination, we will use the most recent Arbitron Ratings Television ADI Market Guide. We will determine the number of radio stations in the relevant television metropolitan market and the number of television licensees within the relevant ADI television market based on the most recent Commission ownership records. Other waiver requests will be evalu-

ated on a more rigorous case-by-case basis, as set forth in the Second Report and Order in MM Docket No. 87-7, FCC 88-407 [4 FCC Rcd 1741], released February 23, 1989, and Memorandum Opinion and Order in MM Docket No. 87-7, FCC 89-256 [4 FCC Rcd 6489], released August 4, 1989.[3]

Because RPI already owns both WPGA(AM) and WPGA(FM), Perry, Georgia, RPI's instant television application is eligible for a grant only if it justifies a rule waiver as provided for in the last sentence of Note 7 (since Perry is not within the "top 25" television markets, and there is no showing of "failed" broadcast facilities).

15. To address the common ownership issue, RPI relied at hearing upon the direct written testimony of Lowell Register, who has owned and managed its two Perry facilities for approximately 28 years (and the last 14 years as sole owner of RPI). I.D., paras. 41-42. Based on his experience as a broadcaster and as a member of the local Chamber of Commerce, Kiwanis Club, and Hotel-Motel Tax Advisory Committee, Register opined that his proposed television station would be economically viable only if it "use[d] relatively modest technical facilities to carve out a local viewership, while relying on [RPI's] existing personnel and physical plant to provide experience, expertise and operating efficiencies." *Id.*, paras. 42-43. To further support this opinion, Register also relied on his familiarity with UHF television station economics gleaned from his past sales of computer logging and billing programs to UHF stations, including one such station (WPAN-TV, Fort Walton Beach, Florida) which went bankrupt after construction. He further relied on trade press articles which concluded that "high programming costs and a depressed market have seriously affected the operations of non-network UHF stations." *Id.*, paras. 45, 47.

16. In addition, Register stated that the proposed station would compete for audience and advertising revenues with the following: Three local network-affiliated television stations licensed to serve Macon, Georgia (RPI's proposed city-grade signal will cover Macon, and the Macon stations' signals currently cover Perry); a newly-authorized television station in Macon which will provide a fourth city-grade service to Perry; a new television channel that has been allocated to nearby Warner Robins; a potential new television station in Cordele (an application for which has been accepted for filing by the Commission); two "off-the-air signals" from Columbus, Georgia that are received in Perry; and seven cable television systems (including one in Perry itself) which serve every nearby significant town. I.D., para. 47; RPI Exh. 3 at 3. Also, Register noted that RPI's stations WPGA-AM-FM compete with 19 other radio stations. RPI Exh. 3 at 4, 17.

17. RPI submitted a cost analysis showing that total monthly operating expenses for a stand-alone television station in Perry would be $30,975 compared to $21,500 for its proposed commonly-owned and commonly-operated television station. I.D., para. 49. Common ownership would thus save $9,475 per month, or $113,700 per year. Also, RPI estimated that construction costs for a stand-alone television station would be $369,000 compared to $174,000 for common ownership, *id.*, para. 51, a savings of $195,000.

18. Based on the foregoing findings, the ALJ concluded that RPI failed to carry its burden of proving that it would be in the public interest for RPI to commonly own a UHF television station in Perry, Georgia, along with Stations WPGA-AM-FM. *Id.*, para. 96. In particular, he held that RPI failed to prove that the community of Perry is unlikely to sustain an independent UHF station without economic savings from common ownership. *Id.*, paras. 92-93.

19. *Discussion*: We agree with the thrust of RPI's exceptions (Br. at 42-44) that the totality of record evidence, viewed through the prism of applicable Commission precedent, supports the conclusion that common ownership of RPI's proposed UHF television station at Perry, along with its Stations WPGA-AM-FM, is consistent with the public interest.[4] The Commission has recently explained that analysis of TV-radio common ownership rule waiver requests generally focuses on five factors: potential public service benefits; types of facilities involved; number of stations already owned by the applicant; financial difficulties of the stations; and the nature of the market. *Radio-TV Cross-Ownership*, *supra* note 3, 4 FCC Rcd at 1753; *Holston Valley Broadcasting Corp.*, FCC 89-367, released January 25, 1990. We shall evaluate the record evidence in light of these factors.

20. First, as to the public service benefits, RPI has estimated that common ownership would save more than half of estimated station construction costs (a one-time savings of $195,000), and reduce operating expenses by about one-third (some $113,700 per year). These cost savings would be generated by co-locating studio and office facilities, the transmitting tower, and sharing personnel. *See* I.D., paras. 49-51. The Commission has recognized that these kinds of efficiencies generally permit commonly-owned stations to air more news, public affairs, and other non-entertainment programming. *See Radio-TV Cross-Ownership*, 4 FCC Rcd at 1746-49. Also, a grant of RPI's common ownership proposal will immediately permit an unused UHF channel to become operational in the small Perry market, and thus actually serve the public, rather than lying fallow until some future applicant materializes. *See id.* at 1749. The Commission also believes that common ownership savings tend to lead to improvements in existing facilities, *id.* at 1749-50, and we note that RPI has a track record of modernizing its facilities, including such items as "install[ing] a new transmitter, audio mixing consoles, turntables, tape equipment and remote pickup equipment[,] . . . initiat[ing] stereo programming on the AM facility and . . . obtain[ing] a new local weather radar system. *I.D.*, para. 46.

21. Second, as to the type of facilities in question, the proposed radio-TV combination involves a proposed UHF television station, a small, 1.0 kilowatt daytime-only AM station, and a Class A FM station, RPI Exh. 3 at 4, which is exactly the sort of combination that the Commission recognizes tends to "provide relatively greater public interest benefits and impose relatively fewer public interest costs." *Radio-TV Cross-Ownership*, *supra*, 4 FCC Rcd at 1753. Third, as for the number of stations presently owned by the applicant, it is undisputed that Stations WPGA-AM-FM are the only media outlets that RPI (or Register) owns. I.D., para. 52.

22. Finally, and perhaps most vitally, we must "review the nature of the relevant market in light of the [Commission's] traditional diversity and competition concerns, especially with respect to the number of broadcast outlets

and separate 'voices' that would exist if the merger were approved, as well as the degree of cable penetration and the availability of other non-broadcast media. In this regard, proof of substantial cable penetration in the relevant market may enhance an applicant's waiver request." *Radio-TV Cross-Ownership, supra*, at 1753. To determine the number of broadcast outlets, the Commission considers "all full-power TV stations, both commercial and non-commercial, licensed to the relevant ADI television market and operating AM and FM radio stations licensed to the relevant TV metropolitan market," as revealed in the Arbitron Television ADI Market Guide and in Commission ownership records. *Id.* at 1751 & nn. 84, 85. *See Tulsa 23*, FCC 89-321, released February 7, 1990, at para. 8.

23. The city of Perry (1980 U.S. Census population of 9,453) lies within Houston County (pop. 77,605), RPI Exh. 3 at 10, 14, which in turn is wholly encompassed within both the Macon ADI Television Market (which has 165,500 households, and is the 130th largest of the 212 ADIs ranked by Arbitron) and the Macon Metro Television Market.[5] Perry is located approximately 25 miles from the city of Macon, Georgia (1980 pop. 116,896), the core city of the Macon ADI and Metro Markets; it is about 12 miles from the nearest substantially-sized city, Warner Robins (1980 pop. 39,893); and it is approximately 5 miles from Fort Valley (pop. 9,000).[6] The Macon ADI is served by 3 network-affiliated television stations licensed to the city of Macon: WMAZ-TV (VHF Channel 13, CBS); WGXA (UHF Ch. 24, ABC); and WMGT (UHF Ch. 41, NBC); as well as served by non-commercial television station WDCO-TV (UHF Ch. 15), Cochran, Georgia.[7] WMAZ-TV is co-owned with Macon radio stations WMAZ(AM) and WAYS(FM) by Multimedia, Inc., a major group owner.[8] While RPI owns the only radio stations licensed to Perry, these stations compete with 14 other radio stations in the Macon Metro market (nine of which stations are licensed to Macon, and three each to Warner Robins and Fort Valley).[9] Several of these competing radio stations are co-owned: WMAZ(AM) and WAYS(FM), Macon, as earlier mentioned; WDDO(AM) and WPEZ(FM), Macon; and WDEN-AM-FM, Macon.[10] Thus, these four rival television and 14 other radio stations represent 14 independent electronic mass media "voices" competing with RPI in the Macon/Perry market. In addition, Arbitron data reveals that the Macon ADI television market is served by 29 cable television systems with an overall penetration factor of 63%, three daily newspapers, and 27 magazines and newspaper supplements.[11] Based on this evidence, we find that a grant of RPI's waiver request will not create an excessive concentration of mass media control in the area, but instead will permit RPI to compete more effectively against several other media combinations, one of which is a network-affiliated VHF-AM-FM combination in Macon.

24. In sum, of the five factors generally considered by the Commission in TV-radio cross-ownership cases, four favor grant of RPI's instant waiver request and establish that the proposed cross-ownership will strengthen overall competition in the market. Only the factor of station financial difficulties has not been demonstrated, inasmuch as RPI made no showing regarding the financial condition of its existing Stations WPGA-AM-FM, and has made no revenue projections for the proposed UHF television station in Perry. However, the Commission does not require that all five criteria be satisfied as a pre-condition to grant of a waiver. *See Radio-TV Cross-Ownership, supra*, at 6491; *Holston Valley, supra*; *see also Duane J. Polich, supra* note 3, 4 FCC Rcd at 5596. In any event, we observe that RPI's existing stations (a one kilowatt daytime-only AM station and a 3 kW Class A FM station) in the rural Perry area are not high-powered stations serving large audiences, and therefore are not likely to be high revenue producers. Also, we agree with RPI that the modest-sized population within its proposed service area makes the financial success of any proposed UHF television station there a challenging proposition. *See* RPI Exh. 3 at 2-5. Indeed, RPI's proposal to serve a very small community located at some distance from the hub of its ADI television market, while receiving competition from three network-affiliates, several other media voices, and substantial cable penetration, is comparable to other cases where UHF-radio cross-ownership has been permitted. *See Polich, supra* (Pullman, Washington; Note 7 waiver granted); *TV-8, Inc., supra* note 4, 91 FCC 2d at 1013-16 (Somerset, Kentucky; UHF-AM combination granted and competing satellite proposal, requiring no cross-ownership waiver, denied), *rev. denied*, FCC 83-238, released August 29, 1983; *cf. Meredith Corp.*, 4 FCC Rcd 2666, 2675-79 (Rev. Bd. 1989) (Inverness, Florida; "satellite necessity" found). Thus, RPI's proposed common ownership: (1) would activate an unused UHF television channel allocated to a very small community; (2) would provide a first local television outlet to Perry; (3) would entail a very modest technical operation; (4) would face formidable competition; and (5) would increase the proposed station's problematic chances of economic success without creating any undue media concentration in the Perry area. *See Polich, supra*, at 5597. Furthermore, in view of the number of radio and television stations whose signals are received in the Perry area, as well as the significant cable penetration in the market, we do not find that the proposed cross-ownership would unduly concentrate the media in the surrounding area or have a substantial adverse impact on media diversity or competition in the market. Therefore, we conclude that approval of RPI's common ownership proposal will serve the public interest, fully justifying a Section 73.3555 Note 7 waiver here.

CONCLUSIONS

25. Having considered all decisionally significant exceptions, we will grant RPI's application. RPI is fully qualified to be a Commission licensee; and, with the disqualification of PTI, it is the only remaining qualified applicant in this proceeding.[12]

26. ACCORDINGLY, IT IS ORDERED, That the unopposed petition for leave to amend filed on September 13, 1989 by Perry Television, Inc. IS GRANTED, and the amendment IS ACCEPTED;

27. IT IS FURTHER ORDERED, That the petition for leave to amend filed on January 3, 1990 by Radio Perry, Inc. IS GRANTED, and the amendment IS ACCEPTED for reporting purposes only;[13]

28. IT IS FURTHER ORDERED, That the motion to strike filed August 21, 1989 by Radio Perry, Inc. IS GRANTED IN PART and DENIED IN PART, and that pages 23-25 of the reply brief filed on August 18, 1989 by Perry Television, Inc. ARE STRICKEN; and that the motion to strike filed on September 25, 1989 by Radio Perry,

Inc. IS GRANTED, and the letter (and accompaniments) filed on August 23, 1989 by counsel for Perry Television, Inc. ARE STRICKEN; and,

29. IT IS FURTHER ORDERED, That the application of Perry Television, Inc. (File No. BPCT-870317KH) IS DENIED, and the application of Radio Perry, Inc. (File No. BPCT-870317KI) for a Construction Permit to establish a new television station at Perry, Georgia on UHF Channel 58 IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] *See Clarification on Ownership Attribution*, 1 FCC Rcd 802, 804 (1986); *Mark L. Wodlinger*, 3 FCC Rcd 3139, 3141 (Rev. Bd. 1988).

[2] In addition, while there is merit in RPI's assertion (Br. at 36, 41) that PTI's failure to disclose in its application and related documents that its control resided elsewhere than in the nominal "voting" shareholders listed in its application amounts to a disqualifying lack of candor, if not outright misrepresentation, we need not reach this somewhat distinct question in light of PTI's disqualification under the real-party-in-interest issue.

[3] When the HDO was released (on September 8, 1987), an earlier version of Section 73.3555 was in effect. The waiver provision was then contained in Note 4, which provided for a case-by-case analysis where a UHF television applicant already owned an AM or FM station (or both) serving the proposed community, as is the case with RPI. HDO, 2 FCC Rcd at 5475. After close of the hearing record (but before issuance of the I.D.), the rule was amended to more readily permit grant of waivers in limited situations involving the top 25 television markets or "failed" broadcast stations, and the waiver provision was reworded and renumbered as Note 7. *Radio-TV Cross-Ownership*, 4 FCC Rcd 1741 (1989), *on reconsideration*, 4 FCC Rcd 6489 (1989). Because these special circumstances do not obtain here, the "case-by-case" approach remains in effect. *See* I.D., para. 95. Therefore, as specified in the rule-making, RPI's waiver request is governed by the following five criteria:

> (1) potential public service benefits such as economies of scale, cost savings, and programming and other service benefits;
>
> (2) types of facilities involved;
>
> (3) number of stations already owned by the applicant;
>
> (4) financial difficulties of the station(s); and
>
> (5) nature of the market in light of the Commmission's diversity and competition concerns.

4 FCC Rcd at 1753. *See Duane J. Polich*, 4 FCC Rcd 5596 (1989).

[4] In this regard, we deny PTI's exception (Br. at 1-6) to the admissibility of the testimony of RPI principal Lowell Register, because we agree with the ALJ that PTI adequately demonstrated Register's competence to testify based on his long-time broadcast experience in the market, his business relationships with UHF television stations, and his active membership in local business associations. *See I.D.*, paras. 41-47; Tr. 473-74. Also, the Commission regularly considers this type of evidence, which may involve to some extent the opinions of an applicant's principal, in common ownership cases. *See, e.g., Duane J. Polich*, *supra* note 3; *WML LPTV Co.*, 3 FCC Rcd 1956 (1988); *Combined Communications Corp.*, 28 FCC 2d 16 (1970); *TV - 8, Inc.*, 91 FCC 2d 1012, 1014-15, 1021-26 (Rev. Bd. 1982), *review denied*, FCC 83-238, released August 29, 1983. Furthermore, PTI has offered no contrary evidence to refute Register's testimony, and it has had a full opportunity to cross-examine him. *See* Tr. 277-469.

[5] Arbitron Television ADI Market Guide 1988-1989, at 813-14 & XIV.

[6] RPI Exh. 3 at 3, 13-15; Rand McNally Road Atlas (Golden Anniversary Edition), at 28.

[7] Arbitron TV ADI Market Guide, *supra* note 5, at 815.

[8] PTI Exhs. 11, 12.

[9] FCC Master List of Existing AM, FM & TV Stations, November 27, 1989, vol. 1, at 170, 174, 177, 182. Although RPI stated that its radio stations compete with 19 other stations (see RPI Exh. 3 at 4, 17), five of these stations (located at Cochran, Hawkinsville, and Montezuma) are not located within the Macon Metro Television Market.

[10] *Id.* at 174.

[11] *Arbitron TV ADI Market Guide*, *supra* note 5, at 813-14, 816. For example, the city of Macon's cable system serves 27,553 subscribers and has a cable penetration factor of 59.7%; the Warner Robins cable system serves 11,516 subscribers and has 69.4% penetration; Perry's system serves 3,074 subscribers and has 74.7% penetration; Fort Valley's serves 1,959 subscribers, with 71.8% penetration; Hawkinsville's has 1,667 subscribers and 88.9% penetration; the Cochran cable system has 1,390 subscribers and 80.9% penetration; and the Montezuma system serves 1,003 subscribers, with 64.2% penetration. RPI Exh. 3 at 27-34.

[12] Because of the result herein, we need not and do not reach RPI's exceptions (Br. at 3-14) which urge that the ALJ erroneously denied its "Contingent Petition to Enlarge Issues" seeking addition of misrepresentation/lack of candor issues against PTI for its alleged backdating or corporate documents, as well as seeking addition of financial and financial certification issues against PTI. *See Memorandum Opinion and Order*, FCC 89M-350, released February 2, 1989.

[13] In its January 3, 1990 amendment, RPI reported that it had filed an FCC Form 316 with the Commission proposing to transfer all of the issued and outstanding shares of stock of RPI to a new "holding corporation," Register Communications, Inc., in which Lowell Register (100% shareholder of RPI) would subsequently hold a 50% interest and his wife, Janice, the remaining 50%. On January 9, 1990, PTI filed "Preliminary Comments" indicating that, after Commission action on the RPI transfer application, it would comment on the effect of the transfer. Subsequent to the adoption date of this *Decision*, the Board received a PTI pleading styled "Motion for Alternative Relief" (filed March 5, 1990), suggesting that grant of RPI's transfer application may constitute a "major change" in ownership interests requiring dismissal of RPI's instant application. PTI, however, recognizes that the Commission may permit RPI to withdraw its transfer application. Because this PTI pleading involves primarily an application currently pending before the Commission's Mass Media Bureau, we need not reach any opinion as to its grantability and the collateral effect in this proceeding, but instead refer PTI's pleading to the Bureau for its consideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

LICENSEE, LIMITED PARTNERSHIP

For Declaratory Ruling Concerning
Section 310(b)(4) of the
Communications Act of 1934

MEMORANDUM OPINION AND ORDER

Adopted: March 6, 1990; Released: March 14, 1990

By Chief, Domestic Facilities Division:

1. Licensee, Limited Partnership ("Licensee"), pursuant to Section 310(b)(4) of the Communications Act of 1934, as amended, requests a declaratory ruling that the assignment of common carrier point-to-point microwave radio licenses to Licensee, 25 percent of the partnership equity of which is indirectly held by foreign corporations, will not require refusal or revocation of Licensee's authorizations.

2. On October 4, 1989, the Commission issued a public notice (mimeo number 0043) regarding Licensee's request for a declaratory ruling and invited interested parties to file comments. No comments have been received.

3. Section 310(b)(4) provides the Commission with discretionary authority to refuse or revoke the license of any entity of which one-fourth of its equity is indirectly owned or voted by aliens or their representatives.

4. Licensee's request for declaratory ruling has been filed in conjunction with a separate but contemporaneously filed application for the assignment of common carrier microwave licenses from TMC Communications, Inc. ("TMC") to Licensee [File No. 10828-CF-AL-(19)-89]. This assignment of licenses is incidental to an attendant acquisition of TMC by another non-dominate common carrier, Com Systems, Inc. ("Com Systems").

5. Pursuant to the proposed TMC/Com Systems transfer of control, all of the stock of TMC will be acquired initially by a major shareholder of Com Systems, Omni Corp Holdings, Inc. ("Omni Corp Holdings")[1] and it will be transferred subsequently to Com Systems. In the related transaction TMC will assign its common carrier microwave licenses to Licensee.

6. Licensee is a U.S. limited partnership, the general partner and holder of 75 percent of the partnership equity interest of which is another U.S. limited partnership, TeleNetwork Holdings, Limited Partnership ("TeleNetwork Holdings"). The general partner of TeleNetwork Holdings is a U.S. corporation, Spin TeleNetwork, Inc.("TeleNetwork"), all of the voting stock of which is held by U.S. citizens.[2] Licensee's sole limited partner and remaining 25 percent equity holder is TMC, which as previously noted, will be indirectly controlled by foreign corporations.

7. Included with the assignment of authorizations are Management and Traffic Agreements that TMC and Licensee have negotiated. The Management Agreement invests TMC personnel with operational and maintenance responsibilities, which will be performed under the direction of Licensee. The Traffic Agreement permits TMC to lease up to 90 percent of the total capacity of Licensee's facilities. The remainder of capacity will be available for Licensee to lease to other carriers.

8. Section 310(b)(4) provides, *inter alia*, the Commission with discretionary authority to refuse or revoke the license of any corporation whose parent corporation has more than one-fourth of its capital stock owned by foreign nationals or corporations, if the Commission finds that the public interest will be served by such action. The Commission has construed these alien ownership provisions to apply also to limited partnerhips holding or seeking radio licenses. *Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended*, 103 FCC 2d 511(1985) *recon. granid in part*, 1 FCC Rcd 12 (1986).

9. We have examined carefully the degree of alien participation in Licensee and conclude that Commission review is not warranted because indirect alien ownership of Licensee will not exceed 25 percent. Consequently, there is not been a *prima facie* indication that the statutory threshold for triggering Section 310(b)(4) has been reached. Nor is our initial conclusion altered when the Management and Traffic Agreements between TMC and Licensee are considered. Each of these agreements is the product of arm's length negotiations and neither invests TMC with any control over Licensee. There will be no participation by TMC in the management of Licensee's general business affairs. The Management Agreement will permit efficient integration of TMC's operations, and the Traffic Agreement will permit continued utilization of the facilities that Licensee will acquire from TMC. All activities of TMC personnel will be limited to the ministerial operations and technical tasks of ensuring proper day-to-day operations and maintenance of Licensee's facilities, over which Licensee will maintain complete and ultimate control.

10. Accordingly, IT IS ORDERED, pursuant to delegated authority, 47, C.F.R. § 0.291, that the request for declaratory ruling is GRANTED. THE COMMISSION finds that the public interest does not require the refusal to license or revocation of licenses presently held by TMC as a consequence of the assignment of such licenses to Licensee.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] OmniCorp Holdings, a Delaware corporation, is wholly owned by OmniCorp International B.V ("OmniCorp"), a corporation formed under the laws of the Netherlands. The ultimate parent of OmniCorp is Omni Holding AG ("Holding"), a publicly held international corporation organized under the laws of Switzerland. Controlling interest of Holdings is held by Werner K. Rey, a Swiss citizen.

[2] Fifty-one percent of the voting stock of TeleNetwork will be held by Robert Buckley, who is the President and sole Director of the corporation. TeleNetwork's remaining 49 percent of voting stock will be divided equally between Joseph N. Bearden, III and Rex A. Licklider. Mr. Bearden is Vice President, Secretary and Treasurer of the TeleNetwork and Mr. Licklider is a Vice President of TeleNetwork. All three men are also principals of Com Systems.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-97

In re Applications of

Marilyn L. Evans and Billy R. Evans d/b/a EVANS BROADCASTING (hereafter "Evans")	File No. BPH-880121MR
WILLIAM E. BENNS, III (hereafter "Benns")	File No. BPH-880125MQ
ENCLAVE COMMUNICATIONS CORP. (hereafter "Enclave")	File No. BPH-880125MV
K-RIVA, INC. (hereafter "K-RIVA")	File No. BPH-880126MC
BAROL OF LOUISVILLE, INC. (hereafter "Barol")	File No. BPH-880126MD
YOUNG BROADCASTING CORPORATION OF KENTUCKY (hereafter "Young")	File No. BPH-880126MI
DERBY BROADCAST LIMITED PARTNERSHIP (hereafter "Derby")	File No. BPH-880126MO
LOUISVILLE FM BROADCASTERS LIMITED PARTNERSHIP (hereafter "Louisville FM")	File No. BPH-880126MP
WALRUS BROADCASTING, INC. (hereafter "Walrus")	File No. BPH-880126MV
LOUISVILLE FM, INC. (hereafter "LFI")	File No. BPH-880126NC
KENTUCKY URBAN BROADCASTERS, LTD. (hereafter "KUBL")	File No. BPH-880126NH
KRYSTAL COMMUNICATIONS LIMITED PARTNERSHIP (hereafter "Krystal")	File No. BPH-880126NI
AMOS LEE STINSON, SR. (hereafter "Stinson")	File No. BPH-880126NK
COCHRAN-FORSTER PARTNERSHIP (hereafter "Cochran-Forster")	File No. BPH-880126NL
GAIL JAKOBY-MCINTOSH (hereafter "Jacoby-McIntosh")	File No. BPH-880126NS
LOUISVILLE BROADCASTERS, LTD. (hereafter "LBL")	File No. BPH-880126NZ
GRC BROADCASTING CO., INC. (hereafter "GRC")	File No. BPH-880126OA
MIDAMERICA ELECTRONICS SERVICE, INC. (hereafter "Midamerica")	File No. BPH-880126OB
LOUISVILLE COMMUNICATIONS LIMITED PARTNERSHIP (hereafter "LCLP")	File No. BPH-880126OC
INTERMART BROADCASTING LOUISVILLE, INC. (hereafter "Intermart")	File No. BPH-880126OD
CROSSWINDS LIMITED PARTNERSHIP (hereafter "Crosswinds")	File No. BPH-880126OH
WILLIAM E. SUMMERS, III (hereafter "Summers")	File No. BPH-880126OJ
Dr. Lorraine M. Golden and Ruth Sirko d/b/a COMMONWEALTH PARTNERSHIP (hereafter "Commonwealth")	File No. BPH-880126OK
THOROUGHBRED BROADCASTING L. P. (hereafter "Thoroughbred")	File No. BPED-880126OQ

BRIGHTNESS MINISTRIES, INC. (hereafter "Brightness")	File No. BPED-880126QU
ECHONET CORPORATION (hereafter "Echonet")	File No. BPH-880126MQ (PREVIOUSLY DISMISSED)
CHARLES J. JENKINS (hereafter "Jenkins")	File No. BPH-880126MS (DISMISSED HEREIN)

For Construction Permit
for a New FM Station on
Channel 263C2 (100.5 MHz)
in Louisville, Kentucky

HEARING DESIGNATION ORDER

Adopted: February 22, 1990; Released: March 15, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Echonet.* Echonet's application was returned by letter dated September 23, 1988 because its proposal was short-spaced by 0.8 kilometers to the licensed facilities of Station WCNB-FM, Connersville, Indiana and, therefore, had required a waiver of the spacing requirements of 47 C.F.R. § 73.207. Echonet failed to provide the requisite showing that no fully-spaced or lesser short-spaced sites exist and that grant of the requested waiver would be in the public interest. Echonet's failure led to the subsequent denial of the waiver and return of the application.

3. On October 20, 1988 Echonet timely filed a petition for reconsideration and reinstatement *nunc pro tunc* of the return of its application. Echonet argues therein that the short-spacing involved in its proposal was *de minimis* and that the FM Branch based its decision to return its application on an error of law. Specifically, Echonet alleges that its situation is analogous to that in *Kenter Broadcasting Co.*, 62 RR 2d 1573, *aff'd sub nom. Kenter v. FCC*, 816 F.2d 8 (D.C. Cir. 1987), in which an applicant's proposal also specified a short-spaced site, but nevertheless was accepted for filing pursuant to 47 C.F.R. § 73.3566(a) since it contained a request for waiver of 47 C.F.R. § 73.207. Therefore, Echonet believes its application should have been accepted for filing since the application also contained a request for waiver of 47 C.F.R. § 73.207. Additionally, to support its argument, Echonet cites *The Baltimore Radio Show Inc.*, 3 FCC Rcd 169, 170 (Rev. Bd. 1988); *Fuller-Jeffrey Broadcasting Corp. of New England*, 2 FCC Rcd 5098 n.2 (1987); and *Sunshine Group Broadcasting*, 2 FCC Rcd 4723 n.3 (1987).[1]

4. Commission policy does not permit waiver of the minimum distance separation requirements unless no fully-spaced or lesser short-spaced sites exist. *See Donovan Burke*, 104 FCC 2d 843 (1986); *Megamedia*, 67 FCC 2d 1527 (1978). In this proceeding, 26 out of the 27 applicants specified fully-spaced sites. Moreover, Echonet has raised no question about the availability or technical feasibility of these sites. Further, the Commission is aware of no case, and *Kenter* does not include any, in which the *de minimis* exception was applied and a waiver granted in a situation when one applicant specifies a short-spaced site and the others choose fully-spaced sites. Therefore, it would be difficult to grant such a waiver in the public interest when other applicants propose to provide the same service without violating any Commission rule. Accordingly, Echonet's petition for reconsideration and reinstatement *nunc pro tunc* will be denied.

5. *Derby.* Information before the Commission indicates that Derby was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Crawford, Georgia	88-294
Rocky Mount, North Carolina	88-299
Omega, Georgia	88-305
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Nolanville, Texas	88-401
Evansville, Indiana	88-403
Southern Pines, North Carolina	88-407
DeWitt, Michigan	88-425
Germantown, Tennessee	88-429
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433
Charlottesville, Virginia	88-440
Greenwood, Indiana	88-468
Harrison, Ohio	88-535
Panama City, Florida	88-559
Biltmore Forest, North Carolina	88-577
Long Beach, Mississippi	89-66
Albuquerque, New Mexico	89-123
Witchita Falls, Texas	89-352

6. Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant; whether or not the applicant's organizational structure was a sham; and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant dismissed its application rather than resolving these issues. These unresolved issues call into question Derby's qualification to be a Commission licensee. Therefore, such issues will be specified against Derby in this proceeding.

7. *Evans.* Evans' application, as originally filed on January 21, 1988, contained a certification indicating that it was financially qualified. On April 20, 1988, Evans filed an amendment to its application in which it indicated, among other things, that it was withdrawing its previously submitted financial certification. On December 16, 1988,

Evans filed a petition for leave to amend its application. The accompanying amendment contained a certification that Evans was now once again financially qualified.[2]

8. In the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the Commission adopted strict rules governing acceptance of amendments to applications for FM facilities. These rules provide that amendments which address the acceptability or grantability of an application may be filed as a matter of right any time prior to the expiration of the 30-day period triggered by release of the Public Notice announcing that the subject application has been accepted for tender. *See* 50 Fed. Reg. at 19941; *see also* 47 C.F.R. § 73.3522(a)(6). Once this period expires, predesignation amendments "will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514" of our rules.

9. Evans' 30-day period for filing amendments, as a matter of right, began March 21, 1988 and ended April 21, 1988. The December 16, 1988 amendment indicating that Evans was financially qualified was filed after this period. Evans attempts to make a showing of good cause in its petition by arguing that the December 16, 1988 amendment "makes no change in the proposals of the applicants in the instant application for a new FM station at Louisville, Kentucky, and will have no effect on the comparative qualifications of the applicants under the instant application." Therefore, Evans states that the amendment should be accepted pursuant to 47 C.F.R. §§ 1.65 and 73.3522(a)(2).

10. We reject Evans' attempt to invoke § 1.65 of the rules in filing its late amendment. Section 1.65 requires applicants to maintain the continuing accuracy of the information contained in their applications. This rule does not, however, require the acceptance of such amendments when, as in the instant case, they cure an acceptability or grantability defect in the underlying application and the period for filing curative amendments as of right has already lapsed. *See, e.g., Donovan Burke*, 104 FCC 2d 843 (1986). Sections 1.65 and 73.3522 are complimentary, not conflicting rules and we will not allow applicants, under the guise of a § 1.65 reporting amendment, to circumvent deadlines established for the filing of curative amendments per § 73.3522. Based on the foregoing, we find that Evans has failed to establish good cause for acceptance of its December 16, 1988 amendment. Accordingly, the financial certification contained in Evans' December 16, 1988 amendment will not be accepted for filing under 47 C.F.R. § 1.65 and the amendment will be returned to the extent indicated herein.[3] In addition, a financial qualifications issue will be specified below.

11. *Stinson*. On April 20, 1988 Stinson amended its application to specify a new transmitter site. The contour map which is part of the amendment (Exhibit E-5) does not show the legal boundaries of the proposed community of license. Therefore, it cannot be determined whether or not Stinson's proposal, as amended, will provide a 3.16 mV/m signal to the entire proposed city of license as required by 47 C.F.R. § 73.315(a). Because the legal boundaries of the proposed community of license were omitted from an amendment, an appropriate issue will be specified below. *See The Taber Broadcasting Company of New Mexico*, 4 FCC Rcd 7892 (1989).

12. *Jenkins*. Study of Jenkins' proposal reveals a discrepancy in the values specified for the antenna height above average terrain (HAAT). In Section V-B, Question 7(b)(3) of his application, Jenkins indicates that the HAAT is 43.5 meters. However, the contour map and Exhibits 3 and 4 of Jenkins' proposal indicate that the HAAT is 150 meters. In the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the Commission adopted procesing standards for applications for new FM service requiring a "hard look" approach as to certain critical elements which are essential to a determination that an application is substantially complete. This approach benefits the public interest by reducing the number of frivolous and speculative applications and by streamlining our processing procedure to make more efficient use of our staff and other resources. *See e.g., Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986). Appendix D of the *Report and Order* specifically requires that the values for the antenna height above average terrain be specified consistently in an application. Further, Appendix D indicates that if required information, in this instance the HAAT values, is provided but, "on the face of the application, [those values are] visibly incorrect or inconsistent," and the inconsistency cannot be "resolved within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data." 50 Fed. Reg. at 19946. The processing guidelines also provide that the discovery of such defects after initial review will result in return of that application as inadvertently accepted for tender. *Id.*

13. Our review of this matter does not allow us to determine which antenna height above average terrain Jenkins intended to specify. Specifically, we attempted to derive the HAAT from the average of the eight radials listed in Section V-B, Question 19. That calculation, however, yielded a value of 70 meters for the HAAT. Because we were unable to resolve the inconsistency in Jenkins' application confidently and reliably, drawing on the application as a whole, his application will be dismissed herein as inadvertently accepted for tender.[4] Moreover, we cannot accept Jenkins' curative amendment because an amendment which corrects a tenderability defect must be filed prior to the close of the window-filing period in order to be accepted. *See Report and Order* in Docket 84-750, 50 Fed. Reg. at 19946; 47 C.F.R. § 1.106(d)(2). Jenkins' amendment was filed well after the window for the Louisville allocation had closed and therefore will be returned with his dismissed application. *See, e.g., The Tabor Broadcasting Company of New Mexico*, 4 FCC Rcd 7892 (1989).

14. *LBL*. On November 2, 1988 K-RIVA filed a petition to dismiss the application of LBL. K-RIVA argues that LBL's application must be dismissed because it was not substantially complete. K-RIVA alleges that LBL did not complete Items 7 and 8 of Question 4, Section II, Form 301 which deals with ownership of other broadcast media. Additionally, K-RIVA questions LBL's legal status because LBL's application, as amended on April 21, 1988, indicated that LBL had become a limited partnership. However, the same amendment changed the name to Louisville Broadcasters, *Inc.*

15. LBL's 30-day period for filing amendments, as a matter of right, began March 21, 1988 and ended April 21, 1988. The matters raised by K-RIVA's petition have been addressed by amendments to LBL's application. The April 21, 1988 amendment included, among other changes, a new Section II to FCC Form 301. Items 7 and 8 of Question 4 were fully answered. On October 24,

1988, LBL filed a motion for leave to amend. The accompanying amendment, filed pursuant to 47 C.F.R. § 1.65 (as listed in paragraph 29 below), corrected the name of the applicant to Louisville Broadcasters, *Ltd.* Accordingly, based on the foregoing, K-RIVA's petition to dismiss will be denied.

16. *Intermart.* On November 3, 1988, K-RIVA filed a petition to dismiss Intermart's application alleging that Intermart failed to provide a response to Question 11, Section V-B, FCC Form 301. That question directs an applicant to certify that its proposal will provide the required city grade coverage (47 C.F.R. § 73.315(a)) and that no major terrain obstruction will prevent line-of-sight to the city of license (47 C.F.R. § 73.316(b)). K-RIVA states that this omission renders Intermart's application unacceptable for tender. On November 16, 1988, Intermart filed an amendment correcting this deficiency. K-RIVA, on November 30, 1988, then filed an opposition to this amendment. K-RIVA argues therein that the required information cannot be derived from other portions of the application, that Intermart's corrective amendment is untimely, and that good cause has not been shown for the acceptance of the amendment. Therefore, K-RIVA contends that the amendment cannot be accepted. *See* 47 C.F.R. § 73.3522(a)(6).

17. Intermart, in its opposition filed November 16, 1988, states that a response to Question 11, Section V-B is not one of the critical items required by Appendix D to the *Report and Order* in Docket No. 84-750, 50 Fed. Reg. 19936 (1985), and therefore cannot result in the application being returned as being unacceptable for tender. Intermart cites several cases where the Commission permitted an applicant to amend post-designation to rectify a minor deficiency. Intermart believes that the information in its application-its contour map in conjunction with its transmitter site map quadrangle-is sufficient to show compliance with 47 C.F.R. § 73.315(a) and (b). Consequently, Intermart believes the Commission should accept its November 16, 1988 amendment and deny K-RIVA's petition.

18. Upon review of this matter, we believe that Intermart should prevail. As noted by Intermart, its application cannot be returned as being unacceptable for tender since Question 11, Section V-B is not one of the critical items required by Appendix D. The failure to provide city grade coverage, were that the case here, traditionally has been made an issue at the hearing and is not sufficient to return the application. *See e.g., Columbus Broadcasting*, 3 FCC Rcd 5480 (M.M. Bur. 1988); *Tamara Klindworth*, 2 FCC Rcd 5528 (M.M. Bur. 1987). However, the contour map submitted by Intermart clearly shows that complete city coverage is predicted under the Commission's Rules. Further, line-of-sight coverage to the city of license is not an absolute requirement. *See, e.g., Rush Broadcasting Co., Inc.*, 26 FCC 2d 480 (1970). K-RIVA has not provided any information which indicates that Intermart could not provide the required city grade coverage over its principal community. Therefore, we find that Intermart's application is in compliance with 47 C.F.R. § 73.315(a) and (b). Accordingly, we will deny K-RIVA's "petition to dismiss" and "opposition to petition for leave to amend" and accept Intermart's corrective amendment.

19. *Barol and Intermart.* Barol and Intermart have filed on April 12, 1988 and April 8, 1988, respectively, oppositions to a pleading entitled "petition to compel financial disclosure," filed by KUBL against all the applicants in this proceeding. The Commission has no record of its having been served with a copy of this petition. However, a review of the oppositions filed by Barol and Intermart reveals that KUBL's petition to compel financial disclosure is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these petitions have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229.

20. *K-RIVA.* K-RIVA indicates in its application, as amended on June 6, 1989, that the husband of Brenda Joyce Kincer (a 51% owner of K-RIVA) is the proposed transferee of WFIA-AM and WXLN(FM), Louisville, Kentucky. The 70 dBu contour of WXLN(FM) would overlap the 70 dBu contour of K-RIVA's instant proposal, thus triggering a potential duopoly problem under 47 C.F.R. § 73.3555. Her husband, Jim Kincer, has indicated his intent, however, to terminate his interest in WXLN(FM) in the event of the grant of the referenced application. Accordingly, an appropriate condition will be specified below.

21. *LCLP.* Paul C. Bather, the sole general partner of LCLP, is a Class B limited partner of Louisville Limited Partnership, licensee of WLSY-FM (formerly WJYL-FM), Jefferston, Kentucky, thus triggering a potential cross interest problem. Mr. Bather has indicated, however, his intent to terminate his relationship with Station WLSY-FM in the event of a grant of the referenced application. Accordingly, an appropriate condition will be specified below.

22. *Enclave, Cochran-Forster and GRC.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Enclave, Cochran-Forster and GRC have filed such statements, they are deficient. Enclave has failed to identify the school(s) or other beneficiaries in its proposed training program for minorities and women interested in entering the broadcast field. Cochran-Forster failed to identify the proposed form of assistance it will provide in its proposed training program for minorities and women interested in entering the broadcast field. Accordingly, Enclave, Cochran-Forster, and GRC will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

23. *KUBL, LCLP, Intermart and Brightness.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. KUBL, LCLP and Intermart have not completed Item 4 correctly. LCLP did not give an address for the applicant. KUBL and Brightness did not list the applicant and its address. Intermart gives a post office box number as the address of the applicant. Accordingly, KUBL, LCLP, Intermart and Brightness must each submit an amendment which gives

all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

24. *Stinson*. Applicants for new broadcast stations are required by 47 C.F.R. § 73.3580 to give local notice of the filing of their applications. Stinson has published the required notice, but the notice is deficient in that it was not published twice a week for two weeks as is required when the notice is published in a daily newspaper. To remedy this deficiency, Stinson must republish his notice, if he has not already done so, and so inform the presiding Administrative Law Judge, within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

25. *GRC*. Section II, Item 6(b) of FCC Form 301 asks whether any member of the immediate family (i.e., husband, wife, father, mother, brother, sister, son or daughter) of *any party* to this application has any interest in or connection with any other broadcast station, pending broadcast application, newspaper in the same area (see Section 73.3555(c). Although GRC answered "No," it stated that "Mrs. Richardson owns less than 5% of Meade Bancorp, Inc." However, GRC fails to identify what type of broadcast media these corporations own, if any. Accordingly, GRC will be required to file a clarifying amendment with the presiding Administrative Law Judge, within 30 days of the release of this Order.

26. *Intermart*. Section II, Item 4, Form 301 (October 1986) requires that an applicant list the applicant and, if other than a natural person, its officers, directors, stockholders and partners with attributable interests. Intermart's application, as amended on July 15, 1988, added Patricia S. Fierro and, as amended on March 21, 1989, added Harley P. Park as two new principals of the applicant. However, Intermart did not update the information required by Section II, Item 4 as it pertains to these two new principals. Accordingly, Intermart will be required to file an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

27. *Crosswinds and Brightness*. Crosswinds and Brightness have requested waiver of 47 C.F.R. § 73.315(a) because their proposed 3.16 mV/m signal will cover less than 100% of the city of Louisville. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (Feb. 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). An engineering study reveals that Crosswinds' and Brightness' 3.16 mV/m contours would cover approximately 95% and 87%, respectively, of the proposed community of license. Accordingly, no waiver is required and the waiver requests will be dismissed as moot.

28. *Brightness*. In Section V-B of Form 301, Brightness indicates that it intends to construct a 132 meter tower (including obstruction lighting) and indicates that the height of the antenna radiation center above ground level (C/R-AGL) and above mean sea level (C/R-AMSL) will be 126 meters and 346 meters, respectively. However, the tower sketch shows the tower height and antenna radiation center heights to be transposed. Given the information in the application, we can determine that the heights on the tower sketch are in error. Consequently, Brightness' application was found to be acceptable for tender and for filing. However, Brightness will be required to amend its application by submitting a corrected tower sketch to the presiding Administrative Law Judge within 30 days of the release of this Order.

29. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATES AMENDMENTS FILED
Evans	July 27, 1988; August 15, 1988; December 16, 1988; February 27, 1989
Benns	May 31, 1988; July 27, 1988; August 29, 1988; January 9, 1989; January 11, 1989; February 7, 1989; June 6, 1989
Enclave	October 13, 1988
K-RIVA	October 27, 1988; June 6, 1989; October 2, 1989
Derby	November 30, 1988, June 16, 1989, June 22, 1989, August 2, 1989, October 30, 1989
Louisville FM	April 26, 1988; June 7, 1988
Walrus	September 29, 1989
KUBL	August 4, 1988
Krystal	November 6, 1989
LBL	October 24, 1988
LCLP	June 6, 1989
Intermart	May 18, 1988; July 15, 1988; September 26, 1988; November 16, 1988; February 1, 1989; March 21, 1989; December 11, 1989; January 25, 1990
Summers	November 27, 1989
Commonwealth	June 28, 1988; September 6, 1989, September 28, 1989; December 20, 1989
Brightness	November 9, 1988

30. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

31. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Derby.

2. To determine whether Derby's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Derby possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine with respect to Evans, whether the applicant is financially qualified.

5. To determine whether the proposal of Stinson would provide coverage of the city sought to be served, as required by 47 C.F.R. § 73.315(a), and, if not, whether circumstances exist which warrant waiver of that Section.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

32. IT IS FURTHER ORDERED, That the petition for reconsideration and reinstatement *nunc pro tunc* filed on September 23, 1988 by Echonet Corporation IS DENIED.

33. IT IS FURTHER ORDERED, That, for the reasons set forth in paragraphs 7 thru 10 hereinabove, the amendment of December 16, 1988 filed by Evans IS HEREBY RETURNED.

34. IT IS FURTHER ORDERED, That the petition to dismiss filed by K-RIVA on November 15, 1988 against Evans IS DISMISSED.

35. IT IS FURTHER ORDERED, That K-RIVA's petition to dismiss, filed November 4, 1988, against Jenkins' application IS GRANTED to the extent indicated herein.

36. IT IS FURTHER ORDERED, That for the reasons set forth in paragraphs 12 thru 13 hereinabove, Jenkins' application IS DISMISSED and the amendment filed thereto on November 23, 1988 IS RETURNED.

37. IT IS FURTHER ORDERED, That the November 2, 1988 petition to dismiss filed by K-RIVA against LBL IS DENIED.

38. IT IS FURTHERED, That K-RIVA's petition to dismiss, filed November 3, 1988, and opposition to petition for leave to amend, filed November 30, 1988, against Intermart ARE DENIED.

39. IT IS FURTHER ORDERED, That the petition to compel financial disclosure allegedly filed by KUBL against all the applicants in this proceeding IS DISMISSED.

40. IT IS FURTHER ORDERED, That in the event of a grant of LCLP's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of program test authorization, the permittee shall certify to the Commission that Paul C. Bather has divested his interest in Station WLSY-FM, Jefferston, Kentucky

41. IT IS FURTHER ORDERED, That in the event of a grant of K-RIVA's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of program test authorization, the permittee shall certify to the Commission that her husband, Jim Kincer, has divested his interest in Station WXLN(FM), Louisville, Kentucky.

42. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Enclave, Cochran-Forster, and GRC shall submit Section VI information in accordance with the requirements of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

43. IT IS FURTHER ORDERED, That KUBL, LCLP, Intermart and Brightness shall each submit an amendment which contains the information required by Section II, Item 4 of the FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

44. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Stinson shall inform the presiding Administrative Law Judge as to whether or not a corrected local notice of the filing of the application has been republished.

45. IT IS FURTHER ORDERED, That GRC shall submit an amendment which contains the information required by Section II, Item 6(b) of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

46. IT IS FURTHER ORDERED, That Intermart shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

47. IT IS FURTHER ORDERED, That the requests for waiver of 47 C.F.R. § 73.315(a) filed by Crosswinds and Brightness ARE DISMISSED AS MOOT.

48. IT IS FURTHER ORDERED, That Brightness shall submit the amendment indicated in paragraph 28 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

49. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Evans, Benns, Enclave, K-RIVA, Derby, Louisville FM, Walrus, KUBL, Krystal, LBL, LCLP, Intermart, Summers, Commonwealth and Brightness ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

50. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

51. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

52. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section

73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The *Baltimore* case is distinguished from the instant proposal because it involved a situation in which *all* the applicants in a mutually exclusive proceeding were allowed by the presiding Administrative Law Judge to file a joint petition for waiver of 47 C.F.R. § 73.207 in order to eliminate a universal environmental issue that had been designated against all the applicants in the proceeding. *Fuller-Jeffrey* and *Sunshine Group* are inapposite because both of those applicants were existing licensees proposing minor changes in their facilities; no mutually exclusivity was involved.

[2] On November 15, 1988, K-RIVA filed a "petition to dismiss" Evans' application. This pleading is essentially a petition to specify issues. Since the Commission's *Report and Order in re Revised Procedures for the Processing of Contested Broadcasting Applications: Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1079), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in this petition have not been considered. Accordingly, the pleading will be dismissed herein and an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to 47 C.F.R. § 1.229.

[3] The amendment will be accepted in paragraph 29 below, however, to the extent that the applicant has met its § 1.65 obligation by informing the Commission of an authorization for assignment of the license of Station WXAM(AM), Buffalo, Kentucky.

[4] On November 4, 1988, K-RIVA filed a petition to dismiss Jenkins' application based on the inconsistency in the values for antenna height above average terrain. On November 23, 1988, Jenkins filed an opposition to the petition to dismiss which was accompanied by an amendment correcting the discrepancy in his application. K-RIVA's petition will be granted to the extent indicated herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 16, 1990

FREQUENCY CHANGES FOR MARITIME MOBILE STATIONS CONDUCTING PRIVATE COMMUNICATIONS BETWEEN 4000 - 27500 KHZ

At 0001 hours Coordinated Universal Time (UTC) on July 1, 1991, maritime stations that operate in the high frequency bands between 4000-27500 kHz (HF bands) must change frequencies. This Public Notice indicates the new frequencies to which ship and coast stations authorized to conduct private communications must switch effective 0001 hours UTC on July 1, 1991. A complete review of the Commission's Rules regarding the maritime mobile HF bands is contained in PR Docket No. 90-133. These changes are required to conform our Rules to revisions of the international Radio Regulations adopted by the Final Acts of the World Administrative Radio Conference for the Mobile Services, Geneva, 1987. (A companion Public Notice, which contains the transfer frequencies for ship and public coast stations, is released simultaneously with this Public Notice.)

Distress and safety frequencies: The following table describes the distress and safety frequencies between 2000-27500 kHz for radiotelephony communications.

Frequency (kHz) prior to July 1, 1991	Frequency (kHz) as of July 1, 1991
2182.0	2182.0
4125.0	4125.0
6215.5	6215.0
8257.0	8291.0
12392.0	12290.0
16522.0	16420.0

Private business and operational: The following table describes the frequencies between 2000-27500 kHz that are currently available for stations conducting business and operational radiotelephony communications in accordance with 47 C.F.R. § 80.373(c). Additional frequencies for business and operational purposes are pending review in PR Docket No. 90-133.

Business and Operational Carrier Frequencies (kHz)

Frequency prior to July 1, 1991	Frequency as of July 1, 1991
2065.0[1,3]	2065[1,3]
2079.0[1,3]	2079[1,3]
2096.5[1]	2096[1]
3023.0[4]	3023[4]
4125.0[2]	4125[2]
4143.6	4146
4419.4	4149
5680.0[4]	5680[4]
6218.6	6224
6221.6	6227
6521.9	6230
8291.1	8294
8294.2	8297
12429.2	12353
12432.3	12356
12435.4	12359
16587.1	16528
16590.2	16531
16593.3	16534
22124.0	22159
22127.1	22162
22130.2	22165
22133.3	22168
22136.4	22171

[1] Limited to peak envelope power of 150 watts.

[2] Available domestically for distress and safety and internationally for calling purposes.

[3] The frequencies 2065.0 kHz and 2079.0 kHz must be coordinated with Canada.

[4] The frequencies 3023.0 kHz and 5680.0 kHz are available to private coast stations licensed to state and local governments and any scene-of-action ships for the purpose of search and rescue scene-of-action coordination including communications with any scene-of-action aircraft.

Private communications in Alaska: Stations authorized in the 4 MHz frequency band for private radiotelephony communications in Alaska, 47 C.F.R. § 80.373(i), must change frequency in accordance with the following table:

Alaska Private Communications Carrier Frequencies (rkHz)

Frequency prior to July 1, 1991	Frequency as of July 1, 1991
4366.7	4366
4369.8	4369
4397.7	4396
4403.9	4402
4422.5	4420
4425.6	4423

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 16, 1990

FREQUENCY CHANGES FOR MARITIME MOBILE STATIONS OPERATING PUBLIC CORRESPONDENCE BETWEEN 4000 - 27500 KHZ

At 0001 hours Coordinated Universal Time (UTC) on July 1, 1991, maritime stations that operate in the high frequency bands between 4000-27500 kHz (HF bands) must change frequencies. This Public Notice indicates the new frequencies to which authorized ship and public coast stations must switch effective 0001 hours UTC on July 1, 1991. A complete review of the Commission's Rules regarding the maritime mobile HF bands is contained in PR Docket No. 90-133. These changes are required to conform our Rules to revisions of the international Radio Regulations adopted by the Final Acts of the World Administrative Radio Conference for the Mobile Services, Geneva, 1987. (A companion Public Notice, which contains the transfer frequencies for ship and coast stations authorized to conduct private communications, is released simultaneously with this Public Notice.)

Distress and safety frequencies: The following table describes the distress and safety frequencies between 4000-27500 kHz for stations operating narrow-band direct-printing (NBDP), digital selective calling (DSC), and radiotelephony communications.

Frequency (kHz) prior to July 1, 1991	Frequency (kHz) as of July 1, 1991
NBDP:	
4177.5	4177.5
6268.0	6268.0
8357.5	8376.5
12520.0	12520.0
16695.0	16695.0
DSC:	
4188.0	4207.5
6282.0	6312.0
8375.0	8414.5
12563.0	12577.0
16750.0	16804.5
Radiotelephony:	
4125.0	4125.0
6215.5	6215.0
8257.0	8291.0
12392.0	12290.0
16522.0	16420.0

Morse code working frequencies: The following table describes the 9 frequency changes for public coast stations working A1A or J2A radiotelegraphy in accordance with 47 C.F.R. § 80.357(b). Ship station changes for calling and safety frequencies, 47 C.F.R. § 80.355(c)(2), and for Morse code working frequencies, 47 C.F.R. § 80.357(a)(3), are pending review in PR Docket No. 90-133.

Coast Stations
Working Carrier Frequencies (kHz)

Frequency prior to July 1, 1991	Frequency as of July 1, 1991
16861.7	17199.2
16871.3	17208.8
16880.9	17218.4
22318.5	22569.0
22348.5	22599.0
22407.0	22657.0
22413.0	22663.5
22425.0	22675.5
22431.0	22681.0

Digital selective calling: Frequencies available for digital selective calling (DSC) in accordance with 47 C.F.R. § 80.359 are pending review in PR Docket No. 90-133.

NBDP and data transmissions: The following table describes the frequency changes for stations operating paired NBDP and data transmissions in accordance with 47 C.F.R. § 80.361(a). Because the revised Radio Regulations includes distress and safety frequencies in Appendix 32, there are no direct transfer frequencies for four of the existing NBDP frequency pairs. In these instances, we have substituted frequencies from the expanded NBDP band and indicated them with an asterisk (*). These frequency pairs, however, are subject to change following international review by the International Frequency Registration Board (IFRB). Ship station changes for non-paired NBDP frequencies, 47 C.F.R. § 80.361(b), are pending review in PR Docket No. 90-133.

Paired frequencies for NBDP and data transmissions (kHz)

	Coast Transmit		Ship Transmit	
Channel Number	Frequency prior to July 1, 1991	Frequency as of July 1, 1991	Frequency prior to July 1, 1991	Frequency as of July 1, 1991
1	4350.0	4210.5	4170.5	4172.5
2	4350.5	4211.0	4171.0	4173.0
3	4351.0	4211.5	4171.5	4173.5
4	4351.5	4212.0	4172.0	4174.0

Paired frequencies for NBDP and data transmissions (kHz)

	Coast Transmit		Ship Transmit	
Channel Number	Frequency prior to July 1, 1991	Frequency as of July 1, 1991	Frequency prior to July 1, 1991	Frequency as of July 1, 1991
5	4352.0	4212.5	4172.5	4174.5
6	4352.5	4213.0	4173.0	4175.0
7	4353.0	4213.5	4173.5	4175.5
8	4353.5	4214.0	4174.0	4176.0
9	4354.0	4214.5	4174.5	4176.5

10	4354.5	4215.0	4175.0	4177.0
11	4355.0	4217.0*	4175.5	4179.5*
12	4355.5	4215.5	4176.0	4178.0
13	4356.0	4216.0	4176.5	4178.5
14	4356.5	4216.5	4177.0	4179.0
1	6494.5	6314.5	6256.5	6263.0
2	6495.0	6315.0	6257.0	6263.5
3	6495.5	6315.5	6257.5	6264.0
4	6496.0	6316.0	6258.0	6264.5
5	6496.5	6316.5	6258.5	6265.0
6	6497.0	6317.0	6259.0	6265.5
7	6497.5	6317.5	6259.5	6266.0
8	6498.0	6318.0	6260.0	6266.5
9	6498.5	6318.5	6260.5	6267.0
10	6499.0	6319.0	6261.0	6267.5
11	6499.5	6325.5*	6261.5	6274.5*
12	6500.0	6319.5	6262.0	6268.5
13	6500.5	6320.0	6262.5	6269.0
14	6501.0	6320.5	6263.0	6269.5
15	6501.5	6321.0	6263.5	6270.0
16	6502.0	6321.5	6264.0	6270.5
17	6502.5	6322.0	6264.5	6271.0
18	6503.0	6322.5	6265.0	6271.5
19	6503.5	6323.0	6265.5	6272.0
20	6504.0	6323.5	6266.0	6272.5
21	6504.5	6324.0	6266.5	6273.0
22	6505.0	6324.5	6267.0	6273.5
23	6505.5	6325.0	6267.5	6274.0
1	8705.0	8430.0*	8344.0	8390.0*
2	8705.5	8417.0	8344.5	8377.0
3	8706.0	8417.5	8345.0	8377.5
4	8706.5	8418.0	8345.5	8378.0
5	8707.0	8418.5	8346.0	8378.5
6	8707.5	8419.0	8346.5	8379.0
7	8708.0	8419.5	8347.0	8379.5
8	8708.5	8420.0	8347.5	8380.0

Paired frequencies for NBDP and data transmissions (kHz)

Channel Number	Coast Transmit Frequency prior to July 1, 1991	Coast Transmit Frequency as of July 1, 1991	Ship Transmit Frequency prior to July 1, 1991	Ship Transmit Frequency as of July 1, 1991
9	8709.0	8420.5	8348.0	8380.5
10	8709.5	8421.0	8348.5	8381.0
11	8710.0	8421.5	8349.0	8381.5
12	8710.5	8422.0	8349.5	8382.0
13	8711.0	8422.5	8350.0	8382.5
14	8711.5	8423.0	8350.5	8383.0
15	8712.0	8423.5	8351.0	8383.5
16	8712.5	8424.0	8351.5	8384.0
17	8713.0	8424.5	8352.0	8384.5
18	8713.5	8425.0	8352.5	8385.0
19	8714.0	8425.5	8353.0	8385.5
20	8714.5	8426.0	8353.5	8386.0
21	8715.0	8426.5	8354.0	8386.5
22	8715.5	8427.0	8354.5	8387.0
23	8716.0	8427.5	8355.0	8387.5
24	8716.5	8428.0	8355.5	8388.0
25	8717.0	8428.5	8356.0	8388.5
26	8717.5	8429.0	8356.5	8389.0
27	8718.0	8429.5	8357.0	8389.5

1	13071.5	12579.5	12491.5	12477.0
2	13072.0	12580.0	12492.0	12477.5
3	13072.5	12580.5	12492.5	12478.0
4	13073.0	12581.0	12493.0	12478.5
5	13073.5	12581.5	12493.5	12479.0
6	13074.0	12582.0	12494.0	12479.5
7	13074.5	12582.5	12494.5	12480.0
8	13075.0	12583.0	12495.0	12480.5
9	13075.5	12583.5	12495.5	12481.0
10	13076.0	12584.0	12496.0	12481.5
11	13076.5	12584.5	12496.5	12482.0
12	13077.0	12585.0	12497.0	12482.5
13	13077.5	12585.5	12497.5	12483.0
14	13078.0	12586.0	12498.0	12483.5
15	13078.5	12586.5	12498.5	12484.0
16	13079.0	12587.0	12499.0	12484.5
17	13079.5	12587.5	12499.5	12485.0
18	13080.0	12588.0	12500.0	12485.5
19	13080.5	12588.5	12500.5	12486.0
20	13081.0	12589.0	12501.0	12486.5
21	13081.5	12589.5	12501.5	12487.0
22	13082.0	12590.0	12502.0	12487.5
23	13082.5	12590.5	12502.5	12488.0

Paired frequencies for NBDP and data transmissions (kHz)

Channel Number	Coast Transmit Frequency prior to July 1, 1991	Coast Transmit Frequency as of July 1, 1991	Ship Transmit Frequency prior to July 1, 1991	Ship Transmit Frequency as of July 1, 1991
24	13083.0	12591.0	12503.0	12488.5
25	13083.5	12591.5	12503.5	12489.0
26	13084.0	12592.0	12504.0	12489.5
27	13084.5	12592.5	12504.5	12490.0
28	13085.0	12593.0	12505.0	12490.5
29	13085.5	12593.5	12505.5	12491.0
30	13086.0	12594.0	12506.0	12491.5
31	13086.5	12594.5	12506.5	12492.0
32	13087.0	12595.0	12507.0	12492.5
33	13087.5	12595.5	12507.5	12493.0
34	13088.0	12596.0	12508.0	12493.5
35	13088.5	12596.5	12508.5	12494.0
36	13089.0	12597.0	12509.0	12494.5
37	13089.5	12597.5	12509.5	12495.0
38	13090.0	12598.0	12510.0	12495.5
39	13090.5	12598.5	12510.5	12496.0
40	13091.0	12599.0	12511.0	12496.5
41	13091.5	12599.5	12511.5	12497.0
42	13092.0	12600.0	12512.0	12497.5
43	13092.5	12600.5	12512.5	12498.0
44	13093.0	12601.0	12513.0	12498.5
45	13093.5	12601.5	12513.5	12499.0
46	13094.0	12602.0	12514.0	12499.5
47	13094.5	12602.5	12514.5	12500.0
48	13095.0	12603.0	12515.0	12500.5
49	13095.5	12603.5	12515.5	12501.0
50	13096.0	12604.0	12516.0	12501.5
51	13096.5	12604.5	12516.5	12502.0
52	13097.0	12605.0	12517.0	12502.5
53	13097.5	12605.5	12517.5	12503.0
54	13098.0	12606.0	12518.0	12503.5
55	13098.5	12606.5	12518.5	12504.0
56	13099.0	12607.0	12519.0	12504.5
57	13099.5	12607.5	12519.5	12505.0

1	17197.5	16807.0	16660.5	16683.5
2	17198.0	16807.5	16661.0	16684.0
3	17198.5	16808.0	16661.5	16684.5
4	17199.0	16808.5	16662.0	16685.0
5	17199.5	16809.0	16662.5	16685.5
6	17200.0	16809.5	16663.0	16686.0
7	17200.5	16810.0	16663.5	16686.5
8	17201.0	16810.5	16664.0	16687.0

Paired frequencies for NBDP and data transmissions (kHz)

	Coast Transmit		Ship Transmit	
Channel Number	Frequency prior to July 1, 1991	Frequency as of July 1, 1991	Frequency prior to July 1, 1991	Frequency as of July 1, 1991
9	17201.5	16811.0	16664.5	16687.5
10	17202.0	16811.5	16665.0	16688.0
11	17202.5	16812.0	16665.5	16688.5
12	17203.0	16812.5	16666.0	16689.0
13	17203.5	16813.0	16666.5	16689.5
14	17204.0	16813.5	16667.0	16690.0
15	17204.5	16814.0	16667.5	16690.5
16	17205.0	16814.5	16668.0	16691.0
17	17205.5	16815.0	16668.5	16691.5
18	17206.0	16815.5	16669.0	16692.0
19	17206.5	16816.0	16669.5	16692.5
20	17207.0	16816.5	16670.0	16693.0
21	17207.5	16817.0	16670.5	16693.5
22	17208.0	16817.5	16671.0	16694.0
23	17208.5	16818.0	16671.5	16694.5
24	17209.0	16902.5*	16672.0	16784.5*
25	17209.5	16818.5	16672.5	16695.5
26	17210.0	16819.0	16673.0	16696.0
27	17210.5	16819.5	16673.5	16696.5
28	17211.0	16820.0	16674.0	16697.0
29	17211.5	16820.5	16674.5	16697.5
30	17212.0	16821.0	16675.0	16698.0
31	17212.5	16821.5	16675.5	16698.5
32	17213.0	16822.0	16676.0	16699.0
33	17213.5	16822.5	16676.5	16699.5
34	17214.0	16823.0	16677.0	16700.0
35	17214.5	16823.5	16677.5	16700.5
36	17215.0	16824.0	16678.0	16701.0
37	17215.5	16824.5	16678.5	16701.5
38	17216.0	16825.0	16679.0	16702.0
39	17216.5	16825.5	16679.5	16702.5
40	17217.0	16826.0	16680.0	16703.0
41	17217.5	16826.5	16680.5	16703.5
42	17218.0	16827.0	16681.0	16704.0
43	17218.5	16827.5	16681.5	16704.5
44	17219.0	16828.0	16682.0	16705.0
45	17219.5	16828.5	16682.5	16705.5
46	17220.0	16829.0	16683.0	16706.0
47	17220.5	16829.5	16683.5	16706.5
48	17221.0	16830.0	16684.0	16707.0
49	17221.5	16830.5	16684.5	16707.5
50	17222.0	16831.0	16685.0	16708.0
51	17222.5	16831.5	16685.5	16708.5

Paired frequencies for NBDP and data transmissions (kHz)

	Coast Transmit		Ship Transmit	
Channel Number	Frequency prior to July 1, 1991	Frequency as of July 1, 1991	Frequency prior to July 1, 1991	Frequency as of July 1, 1991
52	17223.0	16832.0	16686.0	16709.0
53	17223.5	16832.5	16686.5	16709.5
54	17224.0	16833.0	16687.0	16710.0
55	17224.5	16833.5	16687.5	16710.5
56	17225.0	16834.0	16688.0	16711.0
57	17225.5	16834.5	16688.5	16711.5
58	17226.0	16835.0	16689.0	16712.0
59	17226.5	16835.5	16689.5	16712.5
60	17227.0	16836.0	16690.0	16713.0
61	17227.5	16836.5	16690.5	16713.5
62	17228.0	16837.0	16691.0	16714.0
63	17228.5	16837.5	16691.5	16714.5
64	17229.0	16838.0	16692.0	16715.0
65	17229.5	16838.5	16692.5	16715.5
66	17230.0	16839.0	16693.0	16716.0
67	17230.5	16839.5	16693.5	16716.5
68	17231.0	16840.0	16694.0	16717.0
69	17231.5	16840.5	16694.5	16717.5
1	22561.5	22376.5	22192.5	22284.5
2	22562.0	22377.0	22193.0	22285.0
3	22562.5	22377.5	22193.5	22285.5
4	22563.0	22378.0	22194.0	22286.0
5	22563.5	22378.5	22194.5	22286.5
6	22564.0	22379.0	22195.0	22287.0
7	22564.5	22379.5	22195.5	22287.5
8	22565.0	22380.0	22196.0	22288.0
9	22565.5	22380.5	22196.5	22288.5
10	22566.0	22381.0	22197.0	22289.0
11	22566.5	22381.5	22197.5	22289.5
12	22567.0	22382.0	22198.0	22290.0
13	22567.5	22382.5	22198.5	22290.5
14	22568.0	22383.0	22199.0	22291.0
15	22568.5	22383.5	22199.5	22291.5
16	22569.0	22384.0	22200.0	22292.0
17	22569.5	22384.5	22200.5	22292.5
18	22570.0	22385.0	22201.0	22293.0
19	22570.5	22385.5	22201.5	22293.5
20	22571.0	22386.0	22202.0	22294.0
21	22571.5	22386.5	22202.5	22294.5
22	22572.0	22387.0	22203.0	22295.0
23	22572.5	22387.5	22203.5	22295.5
24	22573.0	22388.0	22204.0	22296.0
25	22573.5	22388.5	22204.5	22296.5

Paired frequencies for NBDP and data transmissions (kHz)

	Coast Transmit		Ship Transmit	
Channel Number	Frequency prior to July 1, 1991	Frequency as of July 1, 1991	Frequency prior to July 1, 1991	Frequency as of July 1, 1991
26	22574.0	22389.0	22205.0	22297.0
27	22574.5	22389.5	22205.5	22297.5
28	22575.0	22390.0	22206.0	22298.0
29	22575.5	22390.5	22206.5	22298.5
30	22576.0	22391.0	22207.0	22299.0
31	22576.5	22391.5	22207.5	22299.5
32	22577.0	22392.0	22208.0	22300.0
33	22577.5	22392.5	22208.5	22300.5

34	22578.0	22393.0	22209.0	22301.0
35	22578.5	22393.5	22209.5	22301.5
36	22579.0	22394.0	22210.0	22302.0
37	22579.5	22394.5	22210.5	22302.5
38	22580.0	22395.0	22211.0	22303.0
39	22580.5	22395.5	22211.5	22303.5
40	22581.0	22396.0	22212.0	22304.0
41	22581.5	22396.5	22212.5	22304.5
42	22582.0	22397.0	22213.0	22305.0
43	22582.5	22397.5	22213.5	22305.5
44	22583.0	22398.0	22214.0	22306.0
45	22583.5	22398.5	22214.5	22306.5
46	22584.0	22399.0	22215.0	22307.0
47	22584.5	22399.5	22215.5	22307.5
48	22585.0	22400.0	22216.0	22308.0
49	22585.5	22400.5	22216.5	22308.5
50	22586.0	22401.0	22217.0	22309.0
51	22586.5	22401.5	22217.5	22309.5
52	22587.0	22402.0	22218.0	22310.0
53	22587.5	22402.5	22218.5	22310.5
54	22588.0	22403.0	22219.0	22311.0
55	22588.5	22403.5	22219.5	22311.5
56	22589.0	22404.0	22220.0	22312.0
57	22589.5	22404.5	22220.5	22312.5
58	22590.0	22405.0	22221.0	22313.0
59	22590.5	22405.5	22221.5	22313.5
60	22591.0	22406.0	22222.0	22314.0
61	22591.5	22406.5	22222.5	22314.5
62	22592.0	22407.0	22223.0	22315.0
63	22592.5	22407.5	22223.5	22315.5
64	22593.0	22408.0	22224.0	22316.0
65	22593.5	22408.5	22224.5	22316.5
66	22594.0	22409.0	22225.0	22317.0
67	22594.5	22409.5	22225.5	22317.5

Call and reply radiotelephony: The following table describes the frequency changes for stations operating call and reply radiotelephony in accordance with 47 C.F.R. § 80.369(d).

Call and Reply Radiotelephony Carrier Frequencies (kHz)

Channel Number	Coast Transmit Frequency prior to July 1, 1991	Coast Transmit Frequency as of July 1, 1991	Ship Transmit Frequency prior to July 1, 1991	Ship Transmit Frequency as of July 1, 1991
821	8780.9	8779	8257.0	8255
1221	13162.8	13137	12392.0	12290
1621	17294.9	17302	16522.0	16420
2221	22658.0	22756	22062.0	22060

Radiotelephony public correspondence: The following table describes the frequency changes for stations operating duplex radiotelephony for public correspondence in accordance with 47 C.F.R. § 80.371(b).

Duplex Public Correspondence Channels Carrier Frequencies (kHz)

Channel Number	Coast Transmit Frequency prior to July 1, 1991	Coast Transmit Frequency as of July 1, 1991	Ship Transmit Frequency prior to July 1, 1991	Ship Transmit Frequency as of July 1, 1991
401	4357.4	4357.0	4063.0	4065.0
403	4363.6	4363.0	4069.2	4071.0
404	4366.7	4366.0	4072.3	4074.0
405	4369.8	4369.0	4075.4	4077.0
409	4382.2	4381.0	4087.8	4089.0
410	4385.3	4384.0	4090.9	4092.0
411	4388.4	4387.0	4094.0	4095.0
412	4391.5	4390.0	4097.1	4098.0
414	4397.7	4396.0	4103.3	4104.0
416	4403.9	4402.0	4109.5	4110.0
417	4407.0	4405.0	4112.6	4113.0
418	4410.1	4408.0	4115.7	4116.0
419	4413.2	4411.0	4118.8	4119.0
422	4422.5	4420.0	4128.1	4128.0
423	4425.6	4423.0	4131.2	4131.0

Duplex Public Correspondence Channels Carrier Frequencies (kHz)

Channel Number	Coast Transmit Frequency prior to July 1, 1991	Coast Transmit Frequency as of July 1, 1991	Ship Transmit Frequency prior to July 1, 1991	Ship Transmit Frequency as of July 1, 1991
604	6515.7	6510.0	6209.3	6209.0
605	6518.8	6513.0	6212.4	6212.0
802	8722.0	8722.0	8198.1	8198.0
803	8725.1	8725.0	8201.2	8201.0
804	8728.2	8728.0	8204.3	8204.0
805	8731.3	8731.0	8207.4	8207.0
807	8737.5	8737.0	8213.6	8213.0
808	8740.6	8740.0	8216.7	8216.0
809	8743.0	8743.0	8219.8	8219.0
810	8746.8	8746.0	8222.9	8222.0
811	8749.9	8749.0	8226.0	8225.0
814	8759.2	8758.0	8235.3	8234.0
815	8762.3	8761.0	8238.4	8237.0
822	8784.0	8782.0	8260.1	8258.0
824	8790.2	8788.0	8266.3	8264.0
825	8793.3	8791.0	8269.4	8267.0
826	8796.4	8791.0	8272.5	8270.0
829	8805.7	8803.0	8281.8	8279.0
830	8808.8	8806.0	8284.9	8282.0
831	8811.9	8809.0	8288.0	8285.0
1201	13100.8	13077.0	12330.0	12230.0
1202	13103.9	13080.0	12333.1	12233.0
1203	13107.0	13083.0	12336.2	12236.0
1206	13116.3	13092.0	12345.5	12245.0
1208	13122.5	13098.0	12351.7	12251.0
1209	13125.6	13101.0	12354.8	12254.0
1210	13128.7	13104.0	12357.9	12257.0
1211	13131.8	13107.0	12361.0	12260.0
1212	13134.9	13110.0	12364.1	12263.0
1215	13144.2	13119.0	12373.4	12272.0
1222	13165.9	13140.0	12395.1	12293.0
1223	13169.0	13143.0	12398.2	12296.0
1225	13175.2	13149.0	12404.4	12302.0
1226	13178.2	13152.0	12407.5	12305.0
1228	13184.5	13158.0	12413.7	12311.0
1229	13187.6	13161.0	12416.8	12314.0
1230	13190.7	13164.0	12419.9	12317.0

FEDERAL COMMUNICATIONS COMMISSION

Duplex Public Correspondence Channels
Carrier Frequencies (kHz)

Channel Number	Coast Transmit Frequency prior to July 1, 1991	Coast Transmit Frequency as of July 1, 1991	Ship Transmit Frequency prior to July 1, 1991	Ship Transmit Frequency as of July 1, 1991
1601	17232.9	17242.0	16460.0	16360.0
1602	17236.0	17245.0	16463.1	16363.0
1603	17239.1	17248.0	16466.2	16366.0
1605	17245.3	17254.0	16472.4	16372.0
1607	17251.5	17260.0	16478.6	16378.0
1609	17257.7	17266.0	16484.8	16384.0
1610	17260.8	17269.0	16487.9	16387.0
1611	17263.9	17272.0	16491.0	16390.0
1616	17279.4	17287.0	16506.5	16405.0
1620	17291.8	17299.0	16518.9	16417.0
1624	17304.2	17311.0	16531.3	16429.0
1626	17310.4	17317.0	16537.5	16435.0
1631	17325.9	17332.0	16553.0	16450.0
1632	17329.0	17335.0	16556.1	16453.0
1641	17356.9	17362.0	16584.0	16480.0
2201	22596.0	22696.0	22000.0	22000.0
2205	22608.4	22708.0	22012.4	22012.0
2210	22623.9	22723.0	22027.9	22027.0
2214	22636.3	22735.0	22040.3	22039.0
2215	22639.4	22738.0	22043.4	22042.0
2216	22642.5	22741.0	22046.5	22045.0
2222	22661.1	22759.0	22065.1	22063.0
2223	22664.2	22762.0	22068.2	22066.0
2227	22676.6	22774.0	22080.6	22078.0
2228	22679.7	22777.0	22083.7	22081.0
2231	22689.0	22786.0	22093.0	22090.0
2236	22704.5	22801.0	22108.5	22105.0
2237	22707.6	22804.0	22111.6	22108.0

Public correspondence on the Mississippi River: The following table describes the frequency changes for stations operating public correspondence within the Mississippi River System in accordance with 47 C.F.R. § 80.371(d).

Mississippi River System
Working Carrier Frequencies (kHz)

Frequency (kHz) prior to July 1, 1991	Frequency (kHz) as of July 1, 1991
4063.0	4065
4087.8	4089
4115.7	4116
4410.1	4408
6209.3	6209
6212.4	6212
6515.7	6510
6518.8	6513
8201.2	8201
8213.6	8213
8725.1	8725
8737.5	8737
12333.1	12233
13103.9	13080
16518.9	16417
17291.8	17299

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-73

In re Applications of:

RADIO SOUTH BURLINGTON, INC. (hereafter "Radio")	File No. BPH-880126MG
FAMILY BROADCASTING, INC. (hereafter "Family")	File No. BPH-880126NP
MAXINE W. SNOW (hereafter "Snow")	File No. BPH-880126NX
E. H. CLOSE (hereafter "Close")	File No. BPH-880126OF
MARY ANN SALVATORIELLO (hereafter "Salvatoriello")	File No. BPH-880126OM [DISMISSED HEREIN]

For Construction Permit for a New
FM Station; Channel 263A, 100.5 MHz
Lebanon, New Hampshire

HEARING DESIGNATION ORDER

Adopted: February 7, 1990; Released: March 15, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Family*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Family has not completed Item 4 correctly. Family's application gives a post office box number as the residence address for Robert and Pamela Peake and Timothy Dodge. Accordingly, Family must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. *Salvatoriello*. Pursuant to a *Public Notice* released on December 16, 1987, Mimeo 979, the filing window for Lebanon, New Hampshire opened on December 16, 1987 and closed on January 26, 1988. As originally and timely filed, Salvatoriello's application, including all the signatures, consisted of a facsimile. On January 27, 1988, the day after the close of the window for this proceeding, an application including the appropriate original signatures was provided the Commission by Alan E. Gearing, P.E. from Jules Cohen & Associates, P.C., consulting electronics engineers.

4. 47 C.F.R. § 73.3513 requires, when the applicant is an individual, that the original application be signed by the applicant and that the requisite duplicates "may be conformed." Furthermore, Appendix D to the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), states that "because of the critical importance of the applicant's certification of the correctness of the data contained in the application as of the date of filing, unsigned applications will not be accepted for tender." *See also Taber Broadcasting Company of New Mexico*, 4 FCC Rcd 7892 (1989). Therefore, in view of the Commission's longstanding policy that applications bear the original signature of the applicant, the application by Salvatoriello will be dismissed as inadvertently accepted for tender.

5. *Other Matters*. Radio petitioned for leave to amend its application on August 23, 1988 and January 3, 1989. In addition, Close has petitioned for leave to amend his application on September 1, 1988, October 14, 1988, November 15, 1988 and January 13, 1989. The accompanying amendments were filed after April 22, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Family shall provide the residence addresses for the individuals indicated in paragraph 2, above, to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That in light of the discussion in paragraphs 3 and 4, above, the application by Salvatoriello IS DISMISSED as inadvertently accepted for tender.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Radio and Close ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-95

In re Applications of

SUSAN ELIZABETH DAVENPORT (hereafter "Davenport")	File No. BPH-880107MD
NANTUCKET RADIO, INC. (hereafter "Nantucket")	File No. BPH-880107MJ
SOUTH YARMOUTH AND CAPE COD BROADCASTING COMPANY, INC. (hereafter "Broadcasting")	File No. BPH-880107MK
JOHN W. MILLER (hereafter "Miller")	File No. BPH-880107MX
THE EASTERN COMPANY d/b/a EASTCO (hereafter "Eastco")	File No. BPH-880107MY
GENESIS RADIO, INC. (hereafter "Genesis")	File No. BPH-880107NG
AMERICAN INDIAN BROADCAST GROUP, INC. (hereafter "Group")	File No. BPH-880107NI
CAPE COD FM LIMITED PARTNERSHIP (hereafter "Cod")	File No. BPH-880107MF (PREVIOUSLY DISMISSED)

For Construction Permit
for a New FM Station on Channel 280A
in South Yarmouth, Massachusetts

HEARING DESIGNATION ORDER

Adopted: February 22, 1990; Released: March 15, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On April 4, 1988, Cod filed a petition for reconsideration seeking reversal of the finding of February 18, 1988 by the FM Branch that the subject application was unacceptable for tender.

3. Specifically, Cod's application was found untenderable for failing to provide a proper transmitter site map in accordance with the Commission's Public Notice entitled *FCC Clarifies Transmitter Site Map Requirements*, Mimeo 3693, released April 5, 1985 (51 Fed. Reg. 45945, December 23, 1986). (*See* also Item 4(b), Appendix D, *Report and Order*, Docket 84-750, 50 Fed. Reg. 19936 (1985), which established the requirements for transmitter site maps for applicants filing in a window). Cod's full scale section of a transmitter site map failed to provide either the upper or lower margin, which contains the original USGS labels for the longitude. No reduced portion of the entire map was submitted, which would have permitted us to verify that the actual longitude reference markings were indeed those specified by Cod. Consequently, the application was returned as unacceptable for tender.

4. The Cod petition states that Cod "has satisfied the Commission's coordinate marking and labeling requirements". Specifically, Cod claims that "since line labeling verification is the purpose of this requirement . . . the Commission could easily determine the accuracy of Cape Cod's latitude and longitudinal markings by referencing the 1:500,000 map which was included immediately following the full-sized 7.5 minute series map in Cape Cod's initial application." Hence, Cod maintains that its application is "substantially complete" and therefore should have been accepted for tender. Notwithstanding, citing *Racine Telecasting Co., infra*. Cod avers "case precedent reveals" that it "should be allowed to amend its application and that "failure to reinstate its application would be arbitrary and capricious."

5. The Commission, in the *Report and Order*, *supra*., adopted an FM application processing standard which requires a "hard look" approach as to certain critical elements that are essential to a determination that the application is "substantially complete." In Appendix D to the *Report and Order*, the Commission stated that, henceforth, it would follow a new "substantially complete" standard for determining whether or not an application should be given a reference number and processed. The Commission did not initiate a so-called "letter perfect" standard for receiving applications for processing, as it did, for example, in adopting a "strict compliance" standard for low-power television applications. *See, Low Power Television Service*, 51 RR 2d 476, 501, 502 (1982). It chose, instead, to carefully define, in Appendix D, what constitutes a substantially complete FM application under the new "window filing" procedures. Although administrative fairness requires full notice to parties whose rights may be affected by our policies, where such notice is afforded, the Commission may require strict compliance. *See, Salzer v. FCC*, 778 F.2d 869, 877 (D.C. Cir. 1985) (reversed on other grounds). To meet changed circumstances, we may modify our processing standards and substantial completeness requirements as they apply to FM, so long as we do so explicitly and with good reason and provide adequate notice. *Id.* at 873; *See* also *Radio Athens, Inc.* v. FCC, 401 F.2d 398 (D.C. Cir. 1968). Both requisites are present here. *In re Application of Star Signal Corporation, Memorandum Opinion and Order*, 1 FCC Rcd 450 (1986).

6. Because the processing rules which were the basis for the holding in *Racine Telecasting Co.*, 50 RR 2d 1049 (1981) have been dramatically changed, that case does not apply here to either the new FM processing rules or to "substantial completeness" thereunder. *See, Star Signal, supra.* In making these changes, we articulated the following justifications for taking a "hard look" approach in instituting the tender review of applications and for redefining "substantial completeness" under this new approach: Under our previous system, many errors in key portions of the applications remained undetected until considerable processing time and effort had already been expended. Discovery of fundamental errors so far along in the processing chain resulted in significant delays both in disposing of the flawed applications and in processing problem-free but mutually exclusive applications as well as impeded the disposition of unrelated problem-free applications. Therefore, to prevent carelessly prepared, unprocessable applications from burdening the processing system, we now require applications to be substantially complete at tender or they will be returned, thereby losing their filing status. In order to assist applicants in satisfying our tender standards, we attached as Appendix "D" to the *Report and Order* a detailed list of the criteria utilized in evaluating the substantial completeness of applications. The Commission believes that important benefits can be obtained from this "hard-look" approach. First, the reduction of frivolous and speculative applications will enable us to expedite the processing of applications tendered by serious candidates who are "ready, willing and able" to rapidly bring service to the public. Secondly, streamlining our processing procedures has minimized the Commission's administrative costs, enabling us to make more efficient use of our limited staff and other resources. These benefits are critical to making the window filing and "first come/first serve" process work smoothly and with minimal delay in processing large numbers of applications. *Report and Order*, 50 Fed. Reg. at 19940.

7. A petition for reconsideration must be based upon newly discovered evidence or upon errors of fact or law in the action for which reconsideration is sought. *See* 47 C.F.R. §§ 1.106(c) and (d). In the absence of such a showing, reconsideration will not be granted for the purpose of reviewing matters which the Commission has already considered and resolved. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *affd. sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert den.* 383 U.S. 967 (1966); *Employment Practices of Charlotte, North Carolina Stations*, 77 FCC 2d 1 (1980). Furthermore, in accordance with the *Report and Order* in Docket 84-750, 50 FR 19936 (1985), the only basis for reversing an earlier finding of untenderability is a demonstration that the Commission erred in its earlier determination. *See* specifically Appendix D to the *Report and Order, supra.*

8. We have examined the instant petition and have determined that the Commission did not make an error in returning the Cod application as inadvertently accepted for tender. Cod argues that the Commission should have used the 1:500,000 scale contour map to verify the missing longitude markings on the transmitter site map. However, no line on the 1:500,000 map corresponds to any on the transmitter site map. Thus, it was not possible to verify the missing markings and we were unable to independently ascertain the accuracy of Cod's longitudinal markings. To allow perfecting amendments after the 30-day "window" filing period has lapsed would undermine the streamlined, efficient processing procedures adopted in the *Report and Order* to expedite the authorization of new or expanded FM service to the public. *See Donovan Burke*, FCC 86-180 (released April 18, 1986.) Accordingly, the Cod petition will be denied.

9. *Davenport.* Dewitt Davenport, the husband of applicant, is a principal of New England Television Corporation, licensee of WNEV-TV, Boston, Massachusetts. Dewitt Davenport has indicated his intent to terminate his relationship with WNEV-TV in the event of grant of the referenced application. Accordingly, in the event of grant of Davenport's application, Dewitt Davenport will be required to sever all connections with WNEV-TV prior to the commencement of program

10. *Nantucket.* Information before the Commission indicates that Nantucket was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Crawford, Georgia	88-294
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

An identical three-fold issue was specified in each proceeding: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than litigate the potentially disqualifying character issue. This unresolved character issue calls into question Nantucket's qualification be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

11. *Genesis.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Genesis has filed such statement, it is deficient. Applicant has not listed specific recruitment sources for either minorities or women. Accordingly, Genesis will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

12. Genesis proposes to mount its antenna on the existing WOCB-AM tower. Our engineering study indicates that this proposal may cause excessive radiofrequency radiation. The combined operation of the existing station and the proposed station may significantly exceed the radiofrequency radiation guidelines under 47 C.F.R. § 1.307(b). Accordingly, Genesis is required to amend its application within 30 days of the release of this Order to demonstrate compliance with the RF radiation guidelines. The cumulative effect of the proposed operation and all nearby RF sources must be considered. Since Genesis' proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Genesis will be required to file, within 30 days of the release of this Order, an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.* 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

13. *Group*. 47 C.F.R. § 73.3555 (d)(1) provides that no license for a commercial FM station will be granted to a party if the grant would result in the party, directly or indirectly, owning, operating or controlling, or having a cognizable interest in more than twelve (12) stations in the same service which are not minority controlled. At the time Group filed its instant application, it had applications on file for 13 FM station construction permits for the following communities:

Shreveport, La.
Alamogordo, NM
Hartford, Mi.
Panama City Beach, Fl.
Post, Tx.
Atlantic City, NJ
Lawton, Ok.
Germantown, Tn.
State College, Pa.
Dewitt, Mi.
San Angelo, Tx.
Windsor, Va.
Topeka, Ks.

Since it appears from the name of the applicant ("American Indian Broadcast Group, Inc.") that Group may be minority controlled and therefore in compliance with § 73.3555(d)(1), the application will not be dismissed *at this time* for violation of the inconsistent application rule, 47 C.F.R. § 73.3518, as required by the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. at 19940. Accordingly, Group shall submit an amendment addressing the minority control status of the application.

14. *Other matters*. The applicants listed below have petitioned for leave to amend their applications. The accompanying amendments were filed after April 7, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	DATE AMENDMENTS FILED
Davenport	August 24, 1988 (Engineering)
Nantucket	November 16, 1988
Miller	October 24, 1988 and June 15, 1989 (Engineering)
Eastco	September 16, November 15 and December 14, 1988; October 27, 1989
Group	April 28, July 11 and October 27, 1988; February 17, February 21, June 1, August 8, September 7 and October 27, 1989

15. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

16. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

17. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Nantucket.

2. To determine whether Nantucket's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to issues 1 and 2, above, whether Nantucket possesses the basic qualifications to be a licensee of the facilities sought herein.

4. If a final environmental impact statement is issued with respect to Genesis in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

18. IT IS FURTHER ORDERED, That Cod's petition for reconsideration IS HEREBY DENIED.

19. IT IS FURTHER ORDERED, That, in the event of grant of Davenport's application, Dewitt Davenport will be ordered to divest himself of all interests in and sever all connections with Stations WNEV-TV, Boston, Massachusetts prior to the commencement of program test authority.

20. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Genesis shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

21. IT IS FURTHER ORDERED, That in accordance with paragraph 12 hereinabove, Genesis shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

22. IT IS FURTHER ORDERED, That Group shall file the amendment, as specified in paragraph 13 above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

23. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Davenport, Nantucket, Miller, Eastco and Group ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

24. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

25. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

26. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-93

In re Applications of

BOOTH COMMUNICATIONS (hereafter "Booth")	File No. BPH-871230MK
CAT COMMUNICATIONS, INC. (hereafter "Cat")	File No. BPH-871231MM
SURFSIDE BROADCASTING CORPORATION (hereafter "Surfside")	File No. BPH-871231MO
RAYMOND F. REICH (hereafter "Reich")	File No. BPH-871231MS
CLARENCE T. BARINOWSKI (hereafter "Barinowski")	File No. BPH-871231MY
DOROTHY BLANTON (hereafter "Blanton")	File No. BPH-871231NC
PURITAN RADIOCASTING COMPANY (hereafter "Puritan")	File No. BPH-871231ND

For Construction Permit
for a New FM Station on Channel
258A (99.5 MHz) in Socastee,
South Carolina

HEARING DESIGNATION ORDER

Adopted: February 16, 1990 **Released: March 19, 1990**

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter*. On September 8, 1988, Booth filed a "Petition to Deny or Dismiss" the Barinowski application. The basis for the petition was that by filing the instant application for Socastee, Barinowski violated 47 C.F.R. § 73.3555, the multiple ownership rules, and 47 C.F.R. § 73.3518, which prohibits the filing of inconsistent applications. Specifically, on July 30, 1987, noncommercial applicant Augusta Radio Fellowship Institute, Inc, ("ARF") filed an application for construction permit for a noncommercial educational FM broadcast station in Murrell's Inlet, South Carolina (BPED-870730MV). Barinowski is the president of ARF. Subsequently, on December 31, 1987, Barinowski, as an individual, filed the instant application to serve Socastee, South Carolina. Since both proposed to utilize the same transmitting antenna tower, the predicted 3.16 mV/m contours of these two applications would substantially overlap. Because of this signal contour overlap and the fact that Barinowski is a principal in both applicants, Booth asserts that the ARF and Barinowski applications violate 47 C.F.R. § 73.3555(a)(2) and 47 C.F.R. § 73.3518 of the Commission's Rules.

3. We disagree. The Commission's multiple ownership rules specifically state that "[t]his section is not applicable to noncommercial educational FM . . . stations." *See* 47 C.F.R. § 73.3555(f). Thus, noncommercial educational FM stations are not counted for purposes of our multiple ownership rule restrictions. *See Northern Illinois University*, Memorandum Opinion and Order, 2 FCC Rcd 2496 (1987). Therefore, Booth's reliance on § 73.3518 is misplaced. Accordingly, Booth's petition will be denied.

4. *Cat*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Cat has not completed Item 4 correctly. Cat's application gives a post office box number as the residence address for preferred shareholders George C. Avent and John A. Jeffords. Accordingly, Cat must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

5. Cat proposes to side-mount on an existing structure. The tower data submitted in Section V-B of FCC Form 301 (October 1986) lists the overall height above ground level (AGL) of the existing tower at 91 meters and the overall height above mean sea level (AMSL) of the tower as 97 meters. This data exceeds that on record (12.2 meters AGL/19.8 meters AMSL) for the tower at this site. This discrepancy does not affect the acceptability of Cat's application. Since Cat proposes to locate on an existing tower licensed to an existing Commission licensee and specific reference is made to the tower in its application, the staff could confidently and reliably verify the pertinent information regarding Cat's location and signal strength coverage. *See e.g., Laqueth Fleming and Gloria Fleming*, 3 FCC Rcd 3712 (1988). However, since the Commission has no record of a tower structure at the heights proposed by Cat, an air hazard issue must be specified.

6. *Reich*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Reich has filed such statement, it is deficient. Reich has not listed any specific recruitment sources for women or minorities. Accordingly, Reich will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

7. *Blanton*. In response to Section III of FCC Form 301, Blanton responded "No," indicating that she was unable to certify that "sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue." Accordingly, an issue will be specified.

8. *Other Matters*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and applicants Reich and Blanton have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by the applicants would constitute a hazard to air navigation, an issue with respect to Reich and Blanton will be included and the FAA made a party to the proceeding.

9. The applicants listed below have petitioned for leave to amend their applications. The accompanying amendments were filed after March 25, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE FILED
Booth	2/9/89, 6/6/89
Cat	1/31/89
Barinowski	6/28/88, 4/10/89
Puritan	9/6/88

10. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Blanton, whether the applicant is financially qualified.

2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by the Cat, Reich and Blanton would constitute a hazard to air navigation.

3 . To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That Booth's "Petition to Deny or Dismiss" IS HEREBY DENIED.

14. IT IS FURTHER ORDERED, That Cat shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

15. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Reich shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

16. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

17. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Booth, Cat, Barinowski and Puritan ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

18. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-96

In re Applications:

SUNBELT, LIMITED PARTNERSHIP (hereafter Sunbelt)	File No. BPH-880308ME
IDA PAULETTE KNOX WATKINS (hereafter Watkins)	File No. BPH-880308MF
TROY BROADCASTING, CORP. (hereafter Troy)	File No. BPH-880310MJ
BRUNDIDGE RADIO JOINT VENTURE (hereafter BRJV)	File No. BPH-880310MG
DAVID G. HOLMES (hereafter Holmes)	File No. BPH-880310MM
STEPHEN G. McGOWAN (hereafter McGowan)	File No. BPH-880310MO
RALPH W. BLACK, JR. (hereafter Black)	File No. BPH-880310MT
GOOD NEWS LIMITED PARTNERSHIP (hereafter Good News)	File No. BPH-880310NF
PIKE COUNTY BROADCASTING (hereafter Pike)	File No. BPH-880310NQ

For a Construction Permit
For a New FM Station
On Channel 234A In Brundidge, Alabama

HEARING DESIGNATION ORDER

Adopted: February 22, 1990; Released: March 19, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Model EEO Program Statements.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Watkins, Good News and Pike have filed such statements, each is deficient. Watkins has failed to include the cover sheet to the Model EEO Program Form and does not include the certification page to the Form. Additionally, Watkins fails to list any recruitment sources. Since women and blacks both comprise more than five percent of the work force in Pike County, Alabama, Watkins must amend her application specifying recruitment sources for women and blacks. The EEO Program filed by Good News lists a number of contact sources for the purposes of recruitment. However, none of the sources listed are clearly recruitment sources for women or blacks. Accordingly, Good News must amend its application either specifying recruitment sources for both women and blacks or defining the sources already named. The Program filed by Pike has not listed any sources to recruit black employees. As previously stated, blacks make up more than five percent of the available workforce. Accordingly, Pike will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. *McGowan.* Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by McGowan would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

4. *Good News.* Information before the Commission indicates that Good News was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues

call into question Good News' qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Good News in this proceeding.

5. *Pike*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Pike has not completed Item 4 correctly. Pike's application gives a post office box number as the residence address for General Partners J. T. Ramage, III and Wayne C. Curtis. Accordingly, Pike must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

6. *Other Matters*. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
McGowan	October 14, 1988; June 27, 1988
Good News	November 22, 1989; September 13, 1989; June 23, 1989; May 31, 1989
Pike	September 19, 1989; August 24, 1989; June 28, 1989; May 11, 1989; March 16, 1989; November 2, 1989

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by McGowan would constitute a hazard to air navigation.

2. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Good News.

3. To determine whether Good News' organizational structure is a sham.

4. To determine, from the evidence adduced pursuant to Issues 1 through 3 above, whether Good News possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Watkins, Good News and Pike shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by McGowan, Good News and Pike ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That Pike shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MUNICIPALITY OF ANCHORAGE
d/b/a ANCHORAGE
TELEPHONE UTILITY,
Complainant,

v. File No. E-87-35

ALASCOM INC.,
Defendant.

ORDER

Adopted: March 9, 1990; Released: March 15, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 20, 1987, the Municipality of Anchorage d/b/a Anchorage Telephone Utility (ATU), filed a formal complaint against Alascom, Inc. (Alascom) alleging that Alascom had violated the Communications Act with respect to division of certain revenues or disputed settlements for the period 1980 to the effective date of ATU's interstate access tariffs. Alascom denied any such violation and counterclaimed that ATU unlawfully deprived it of certain interstate and intrastate settlements revenues. On March 20, 1989, the Bureau released a *Memorandum Opinion and Order* dismissing the complaint, for the most part, and the counterclaim as barred by the statute of limitation under section 415(b) of the Act because they sought the recovery of damages for alleged violations of the Act or the Commission's rules based on causes of action that had accrued more than two years before the complaint was filed.[1]

2. On March 6, 1990, the parties filed a stipulation and joint motion in which they state that all claims in this matter have been resolved and settled. They request that the Commission dismiss the complaint and counterclaim in this proceeding with prejudice.[2]

3. We are satisfied that dismissal of the complaint and counterclaim will serve the public interest by eliminating the expenditure of further time and resources.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the Stipulation and Joint Motion for Dismissal with Prejudice filed by ATU and Alascom on March 6, 1990, IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint by ATU and Alascom's counterclaim ARE DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Municipality of Anchorage v. Alascom, Inc., 4 FCC Rcd 2472 (Com. Car. Bur. 1989), *application for review pending* (filed Apr. 20, 1989).

[2] Counsel for ATU subsequently indicated that, in light of the parties' settlement, it no longer wished to prosecute its pending application for review. Letter from Frank E. Fletcher, Jr. to Donna R. Searcy (Mar. 7, 1990). Accordingly, in light of our action herein granting the joint motion, such application for review is deemed to have been withdrawn.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 15, 1990

CINCINNATI BELL TELEPHONE COMPANY FILES REVISIONS TO ITS COST ALLOCATION MANUAL

PUBLIC COMMENT INVITED

On February 27, 1990, Cincinnati Bell Telephone Company (Cincinnati Bell) filed proposed revisions to the cost categories of its permanent cost allocation manual for the separation of regulated and unregulated costs. Cincinnati Bell filed its original manual in 1987 pursuant to the requirements of the Commission's *Joint Cost Order*, 2 FCC Rcd 1298 (1987).

Parties may file comments on the proposed revisions to this cost manual no later than **April 13, 1990.** Replies should be filed by **April 27, 1990.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

KENT S. FOSTER File No. 10414-CL-P-666-A-89

For a construction authority to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve Rural Service Area Market 666, Texas 15-Concho

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 1990; Released: March 16, 1990

By the Chief, Mobile Services Division:

I. BACKGROUND

1. On September 21, 1989, Kent S. Foster (Foster) was named tentative selectee for the non-wireline Block A construction authorization for the Texas 15 (Concho) Rural Service Area (RSA).[1] Rita A. Capobianchi (Capobianchi), a competing applicant for the same non-wireline rural cellular authorization, has filed a petition to deny the application, to which Foster has replied.

II. CONTENTIONS OF THE PARTIES

2. In her petition, Capobianchi argues that Foster is a proven speculator who is financially unqualified to be awarded a rural cellular license. The petitioner maintains that Foster has filed several speculative applications for which he lacks the requisite financial qualifications. When Foster's financial qualifications are not challenged, petitioner claims, he quickly sells any permit he receives.

3. Specifically, Capobianchi maintains that the bank letter Foster submitted in support of its application for the Texas 15 - Concho market does not comply with Sections 22.917(c)(5)(i) and (iv) of the Commission's rules. Capobianchi argues that the letter does not state that the bank examined Foster's financial condition and determined that he is creditworthy, and the letter does not state that the bank's willingness to enter into the commitment is based solely on its relationship with Foster. In addition, the petitioner claims that the bank letter does not constitute a firm commitment because the letter indicated that the loan application was subject to review by the bank's loan committee. Capobianchi asserts further that the bank letter requires collateral in the form of cash or securities of a value equal to the amount actually loaned. Foster presented no evidence, petitioner claims, that he owned or owns such collateral free and clear of any liabilities. Moreover, Capobianchi contends, a second bank letter and a cover letter from the bank submitted on July 12, 1989 by Foster to the Commission after the lottery for this market was held, fail to correct the defects in the original letter, and in any event cannot be filed at this late date.

4. In support of her argument that Foster is a proven speculator, Capobianchi points to Foster's application to construct and operate a new mobile satellite system, filed under the name of Global Land Mobile Satellite, Inc. (Global) on April 30, 1985, File Nos. 1625-DSS-P/L-85 and 1626-DSS-P/L-85. Capobianchi maintains that Foster represented to the Commission that he could raise $442 million to construct and operate this system and claimed that he had obtained an unconditional and irrevocable letter of credit for $5 million. However, when the Commission ordered all applicants to deposit the $5 million in a central account, Foster failed to do so. According to Capobianchi, Foster's application was dismissed because Global lacked the requisite financial qualifications. *Global Land Mobile Satellite, Inc.*, 2 FCC Rcd 5552 (Com. Car. Bur. 1987), *aff'd*, 4 FCC Rcd 6029 (1989), *appeal filed sub nom. Aeronautical Radio Inc. v. FCC and USA*, No. 88-1009 and consolidated cases (D.C. Cir., Jan. 7, 1988). This dismissal, petitioner asserts, was not disclosed in the rural cellular application in question here.

5. Capobianchi also points to Foster's prior involvement with a cellular application for the Sherman-Denison, Texas Metropolitan Statistical Area (MSA), as further evidence of Foster's untrustworthiness and lack of financial *bona fides*. Specifically, Capobianchi states that in late 1985 and 1986, Foster induced her to enter into an agreement with him to file cellular applications in 155 MSAs, through Americell, Inc. (Americell), a corporation in which they each held a 50% interest. Under this agreement, Foster agreed to provide the necessary financing for the construction and operation of any cellular systems for which Americell received a permit. Capobianchi notes that Americell won the lottery for the Sherman-Denison MSA, and was named the tentative selectee by the Commission. Americell submitted an equipment vendor financing letter from Motorola, Inc. addressed to Foster in which Motorola agreed to loan Americell up to $1,104,880, provided that Foster execute Motorola's standard guarantees and agreements for the purchase of equipment for the cellular system. Capobianchi states that Foster never complied with his obligations under the letter and never obtained a loan from Motorola or any other financing for Americell.[2] For all these reasons, Capobianchi argues that Foster's application should be denied, or a hearing should be held to determined whether Foster is financially qualified to operate and construct the Concho cellular system.

6. In his reply to the petition, Foster maintains that he is qualified to hold a cellular license and that the allegations in Capobianchi's petition to deny are "unsubstantiated, broad-brushed villifications [sic] of [his] character." According to Foster, the September 28, 1988 letter from the National Bank of Washington (NBW) submitted with his original application, reflects the bank's commitment to loan him up to $2 million for any of the RSA markets for which he received authorizations as a result of Commission lotteries. Foster contends that the cover letter and additional letter, both dated July 12, 1989, renew NBW's commitment letter and do not attempt to correct a defect in Foster's application, as alleged by Capobianchi. Foster claims that these additional documents were submitted because his original commitment letter was due to expire in August 1989 and he wished to

demonstrate to the Commission that NBW was still willing to lend him the necessary funds. Thus, Foster explains, these letters constituted a permissible Section 1.65 amendment to his application.

7. Moreover, Foster argues that in the past, the Commission has considered late-filed documents and declarations in determining whether the original commitment letter meets the Commission's requirements.[3] Foster contends that his application should receive the same consideration as those other applicants cited. Furthermore, Foster argues that any doubt as to the sufficiency of the NBW letters is resolved by the declarations of Tim Toepke, a NBW Branch Manager and Assistant Vice President, and F. Kevin Reynolds, the bank officer who approved Mr. Toepke's recommendation that NBW make the loan to Foster. Foster maintains that these declarations, submitted with his reply, confirm that NBW had made a *bona fide* commitment in the initial financial letter.

8. Foster also disputes Capobianchi's allegation that NBW's original letter and renewed commitment were not "firm financial commitments" because of the requirement that Foster pledge to NBW collateral equal in value to any amount loaned in cash or securities. The renewed commitment letter also required as collateral the assets of the cellular system "and such other assets as may be required in the Bank's sole discretion to make the loan fully secured." Foster claims that this requirement has been included in bank letters by other financial institutions in at least ten other RSA markets and such letters were approved by the Commission.[4] According to Foster, loan commitments contain many terms and conditions which are expected to be resolved prior to finalization of the loan and which the Commission has found to be acceptable contingencies.

9. Foster argues that Capobianchi is incorrect in her assertion that the original NBW commitment letter is not a firm commitment because it states that it is "[s]ubject to the National Bank of Washington's loan committee." In Foster's view, the language used throughout the original letter, read as a whole, clearly demonstrates that there was a firm commitment. Moreover, Foster claims that his payment of a $1,500 commitment fee is important evidence that the letter was a *bona fide* commitment letter. Foster also maintains that the renewed commitment letter and the cover letter which confirm NBW's intent in the original letter is further evidence that there was a firm commitment.[5]

10. Foster contends that the original letter and the renewed letter do include a finding by NBW that it reviewed Foster's financial statements and found him creditworthy. In addition, Foster argues that the declarations by Reynolds and Toepke confirm that NBW had reviewed his financial statement and found him creditworthy.

11. Foster rejects Capobianchi's argument that in other applications he has filed with the Commission he has lacked the requisite financial qualifications to construct and operate facilities. As far as the Global satellite application is concerned, Foster maintains that the company merely made a business decision not to deposit $5 million in cash with the Commission when required to do so. Foster states that he never certified to the Commission that Global had the money to construct the mobile satellite system and the Commission never found that the company lacked financial resources, as falsely asserted by Capobianchi.

12. Foster argues that Capobianchi's dispute with him regarding the activities surrounding Americell's lottery win for the Sherman-Denison, Texas MSA, in no way demonstrates that he lacks integrity to hold a cellular license.[6] Even if he did breach an obligation to Americell to provide funding, Foster contends that there is no reason why the Commission should be concerned about a private contractual matter.[7] Foster insists that he has not made false statements to the Commission.[8]

13. Foster concludes that he is not a speculator but a sophisticated businessman and *bona fide* applicant who has long been involved in communications ventures. He states that his dispute with the petitioner about Americell is unfounded and irrelevant here, and that nothing Capobianchi has filed in this proceeding shows that he is unfit to hold a Commission license.

III. DISCUSSION

14. Section 22.917 of the Commission's rules provides that, at the time an applicant files an application, it shall demonstrate that it has either a firm financial commitment or available financial resources necessary to construct and operate the proposed cellular facility for one year. The rules require that any firm financial commitment from a bank or a recognized financial institution include statements that the lender has examined the financial condition of the applicant and has determined that the applicant is creditworthy and that the lender's willingness to enter into the commitment is based solely on its relationship with the applicant. 47 C.F.R. §22.917 (c)(1), (c)(5)(i), and (c)(5)(iv). These requirements were adopted in the *Amendment of the Commission's Rules for Rural Cellular Service, (Fourth Report and Order)* 4 FCC Rcd 2542 (1988), to maintain the integrity of the Commission's licensing processes by limiting eligibility for RSA applicants to those who sincerely intend, and are actually able to provide, high quality cellular service. Applications containing financial commitment letters which do not meet the requirements are dismissed, and applicants may not amend their applications to correct such defects. *Fourth Report and Order, Id.* at 2545.

15. After having reviewed the original NBW letter, and the arguments advanced by the parties, we conclude that, at the time he filed his application, Foster did not demonstrate that he had a firm commitment for funds upon which he could rely to construct and operate its proposed cellular system for one year, as required by the rules. The first sentence of the NBW letter states that approval of the $2 million loan is "[s]ubject to the National Bank of Washington's loan committee." This statement is vague and leaves the impression that a final decision had not been made regarding the loan to Foster. We also find that, contrary to Foster's contentions, NBW's original letter does not include the statement required by the rules that the bank had assessed the creditworthiness of the applicant. Furthermore, the letter also lacked the statement that the bank relied solely on its relationship with the applicant in making the funds available. Such statements are clearly required by the rules, are not discretionary, and must be submitted with the application in the first instance. The mere fact that an application may have been granted which did not contain these statements does not

serve as a precedent to allow the use of a defective commitment letter here. Had the deficiency been brought to our attention, or had we discovered the non-compliance, we would have enforced the requirements of Section 22.917. *See Clyde W. Pierce*, 4 FCC Rcd 2378 (1989).

16. In addition, the original NBW letter states that the loan is subject to certain terms and conditions including that

> "the Bank shall have a valid, perfected security interest, with a collateral value totalling the amount of the loan advance, in any combination of the following:
>
> A. Certificate(s) of deposit of the Bank. The collateral value assigned to these instrument(s) will be the face value times 100%.
>
> B. Listed stocks acceptable to the bank. The collateral value assigned to these instruments will be the market value times 70%.
>
> C. Securities issued by the United State Government . . . acceptable to the Bank. The collateral value assigned to these instruments will be the market value times 70%-100% as determined by the Bank based on the term and maturity of the securities.
>
> D. It is an event of default for the total collateral value to be less than the amount outstanding on the loan at any point in time."

As Capobianchi points out, Foster failed to present any evidence in his initial application that he could meet this bank requirement.[9] The clear terms of the letter indicate that the bank is requiring collateral over and above the cellular system itself and that the bank would not be willing to make the loan to Foster in the absence of this collateral. The loan condition and Foster's failure to present evidence in his application that he could meet the bank term in his original filing, is a fatal defect in the application.[10]

17. Moreover, we find Foster's argument that its additional commitment letter and cover letter, filed July 12, 1989, contained a firm financial commitment, to be of no avail. First, the supplemental commitment letter contains the same deficiencies as the original NBW letter and in any event cannot be accepted at this date.[11] Second, although the cover letter attached to the additional filing did include the missing statements required by §22.917, the rule requires that a firm financial commitment be included with the original application and a subsequent amendment cannot cure the defect in the application as originally filed.[12]

IV. CONCLUSION AND ORDERING PARAGRAPHS

18. After carefully reviewing the facts and circumstances in the record before us, we find that Kent S. Foster, tentative selectee for the non-wireline Block A construction authorization for the Texas 15-Concho Rural Service Area market (number 666) File No. 10414-CL-P-666-A-89 has not demonstrated that he received a firm financial commitment to construct and operate the proposed cellular system, at the time his application was filed.[13]

19. Accordingly, IT IS ORDERED, that the application of Kent S. Foster, File NO. 10414-CL-P-666-A-89 IS DISMISSED.

20. IT IS FURTHER ORDERED that the petition to deny filed by Rita Capobianchi IS GRANTED.

21. This Order is issued under Section 0.291 of the Commission's rules and is effective on its release date. *See* 47 C.F.R. §1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Public Notice, Report No. CL-89-279 (released September 21, 1989).

[2] In addition, Capobianchi asserts that Foster's financial qualifications have been challenged where he has filed applications for broadcast facilities. For example, Capobianchi claims that the financial qualifications of CHM Broadcasting Limited Partnership (CHM), in which Foster was an investor, for a new FM radio station at Beaumont, Texas, were certified based upon a bank letter procured by Foster from the East Texas State Bank in July 1987. Although this bank was declared insolvent in November, 1988, Capobianchi asserts that this fact was never reported by Foster to the Commission.

[3] In support of his argument, Foster cites Delray Cellular Associates, 3 FCC Rcd 5162 (1988) (affidavit regarding banker's review of financial information); Timothy Roper, 2 FCC Rcd 3439 (Mob. Serv. Div. 1987), 2 FCC Rcd 4458 (Mob. Serv. Div. 1987) (second letter clarifies terms of loan); *Cinkutis, Inc.*, 2 FCC Rcd 6384 (Mob. Serv. Div. 1987) (second letter attached to reply to petition to deny considered in determining adequacy of commitment letter); Corpus Christi Cellular Telephone Co., 64 Rad. Reg. 2d (P&F) 1270 (Mob. Serv. Div. 1988) (affidavit from bank officer clarified intentions of parties); Randolph Cellular Limited Partnership (*Randolph Cellular*), 4 FCC Rcd 5923 (Mob. Serv. Div. 1989) (affidavit of banker considered in denying petition to deny).

[4] Foster cites *Randolph Cellular*, *supra*, as an example of a case where the Mobile Services Division (MSD) rejected a petition to deny that challenged a bank commitment letter which required that one of the principals post "additional collateral of up to 150% of the amount advanced pursuant to the loan." The MSD found that the bank letter satisfied the Commission's rules.

[5] Furthermore, Foster maintains that the declarations of F. Kevin Reynolds and Tim Topeke continually refer to the original commitment letter as "the Bank's September 28, 1988 commitment", "the commitment letter of September 28, 1988", and "our commitment of September 28, 1988."

[6] Foster maintains that in filing her petition to deny, Capobianchi is attempting to gain leverage over him in unrelated litigation over a private contractual dispute.

[7] Foster points out that as a result of the sale of the Sherman-Denison permit, Capobianchi received approximately $2.1 million.

[8] Similarly, in the CHM Broadcasting matter, Foster maintains that he was only a passive investor in CHM and did not control the applicant. However, Foster notes that part of the evidence submitted in the CHM hearing was a financial statement reflecting that in March 1989, Foster's net worth was in excess of $10 million.

[9] Foster's claim that he submitted evidence in a hearing that in March 1989, his net worth was in excess of $10 million, *see* note 8 *supra*, is clearly insufficient to overcome the fact that he did not submit any evidence in his initial application that he has sufficient assets to comply with the conditions in NBW's commitment letter, as required by the rules.

[10] *See* Progressive Cellular III B-2, 4 FCC Rcd. 5254 (Com. Car. Bur. 1989), *appl. for rev. pending*. Foster's reliance on *Randolph Cellular*, *supra*, is misplaced. There, the bank letter contained a contingency clause in which the bank reserved the option to require one partner of the applicant to provide additional collateral to support the loan. Here, the original NBW bank letter did not reserve the option to require Foster to provide collateral. It clearly included as a condition to receiving the loan a requirement that Foster provide the required collateral. Similarly, the cases cited by Foster at note 3 *supra*, do not support his arguments here. An examination of those decisions reveals that in those cases the additional information which was filed served merely to clarify ambiguous statements, and not to correct unambiguous defects in the applications as originally filed.

[11] Similarly, the declarations by the bank officers that they did examine the applicant's creditworthiness, and relied on their relationship with him in approving the loan, cannot cure the fundamental defects in his original financial commitment letter.

[12] Furthermore, even if we could accept these late-filed documents, it is not clear that there would be a firm financial commitment. The additional bank letter included a requirement that Foster pay a commitment fee of two percent or $40,000 to the bank. One half of the fee was to be paid in full upon acceptance of this commitment by Foster. Although Foster signed the letter on July 14, 1989, there was no evidence that the commitment fee was paid. According to the second bank letter, payment of the commitment fee, at the time the letter was accepted, is essential to the commitment.

[13] In arriving at our decision here, it is unnecessary to rule on whether the applicant is a speculator in Commission licenses as argued by the petitioner.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of Certain
Broadcast Stations Serving
Communities in the
State of South Carolina

MEMORANDUM OPINION AND ORDER AND NOTICES OF APPARENT LIABILITY

Adopted: March 5, 1990; Released: March 16, 1990

By the Commission: Commissioner Quello concurring in the results.

1. The Commission has before it for consideration: (i) a "Petition to Deny" filed November 1, 1988, by the National Black Media Coalition,[1] the South Carolina State Conference of Branches of the NAACP, and various local NAACP branches (hereafter "NBMC/NAACP" or "petitioners");[2] (ii) oppositions from the licensees; (iii) the petitioners' reply; and (iv) licensee responses to staff letters of inquiry. The petitioners allege that the challenged licensees violated the Commission's EEO rules and policies. The petitioners request that the Commission investigate the stations' employment practices and designate the applications for hearing.

2. In challenging an application pursuant to Section 309(d) of the Communications Act of 1934, as amended, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Sec. 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988) (*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Sec. 309(d)(1).

3. Gaffney Broadcasting, Inc. (GBI), the licensee of WEAC/WAGI, Gaffney, contends that the National Black Media Coalition (NBMC) and its Chairman, Pluria Marshall, lack standing. The licensee points out that Mr. Marshall's declaration shows that he is a resident of Washington, D.C. but alleges no facts which suggest that he listens to any of the challenged stations. Further, although the declaration filed by each NAACP member clearly indicates that the petition is a collective effort of the local NAACP branch and the NBMC, the local NAACP branch is not affiliated with the NBMC and is not represented by NBMC's counsel. On the contrary, the NAACP has its own counsel of record. Thus, NBMC's status is distinct from that of the local NAACP branches. While each local NAACP branch qualifies as a party in interest as to the station or stations challenged by that branch, NBMC does not qualify as a party in interest as to any of the challenged stations. Accordingly, we conclude that the NBMC does not have standing as a valid petitioner but can only appear before us here as an informal objector. *American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987); *Michigan and Ohio TV Stations*, 3 FCC Rcd 6944 (1988).

4. GBI also appears to argue that the challenge to its renewal applications does not qualify as a petition to deny because the allegations are based solely on speculation. While NBMC/NAACP's arguments and conclusory allegations -- *e.g.*, that a licensee's EEO program was languishing -- are based on NBMC/NAACP's interpretation of the licensee's employment data, NBMC/NAACP's specific factual allegations -- the recruitment sources contacted, the number of referrals received, and the number of full-time black employees -- are derived entirely from the stations' EEO programs and Annual Employment Reports. Because the factual information in each licensee's filings is subject to official notice, *E.g.*, *National Capital Christian Broadcasting, Inc.*, 3 FCC Rcd 1919, 1921 n.1 (1988), it is appropriate for a petitioner's challenge to rely on material contained in the licensee's filings. Whether or not the licensee's filings are sufficient to show that grant of an application is prima facie inconsistent with the public interest is a determination we will make herein with respect to each challenged station. 47 U.S.C. Sec. 309 (d)(1). *See* para. 7, *infra*.

5. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's on-going assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by a licensee.

6. When the renewal application indicates an absence of evidence of discrimination and an adequate record of EEO efforts, it is granted, if otherwise appropriate. When the application indicates evidence of a record of inadequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, the submission of a modified EEO program, renewal for less than a full term, a forfeiture, or a combination thereof. Further, if substantial and material questions of fact exist or if we otherwise cannot find that grant of the application would be consistent with the public interest, we designate the application for hearing. 47 U.S.C. Sec. 309(d)(2); *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *Petition for Reconsideration Pending*; *See* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See also Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual - Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

7. Review of each licensee's EEO program and Annual Employment Reports in conjunction with any specific factual allegations made by NBMC/NAACP leads us to conclude that the petitioners presented a *prima facie* case against each challenged station that grant of the application would be inconsistent with the public interest. *Astroline*, *supra*. The stations' records evidenced an EEO

program which did not adequately explain the licensee's employment record or which reflected little or no EEO efforts. Thus, it could not be determined without further inquiry whether discrimination against minorities may have occurred. *See Beaumont, supra*; *Bilingual, supra*. However, after analyzing each licensee's opposition and response to our inquiry, we conclude that no substantial and material questions of fact remain with respect to each of the challenged licensees and that a grant of each application will serve the public interest. 47 U.S.C. Sec. 309(d)(2). In addition, we find that the EEO efforts of the licensees of Stations WESC/WESC-FM and WEAC/WAGI-FM warrant grant of these applications without sanction or imposition of a prospective remedy. However, we find that each of the remaining licensees did not make adequate EEO efforts. Accordingly, appropriate sanctions/remedies will be imposed. An analysis of each licensee's EEO efforts follows.

Stations WESC/WESC - FM, Greenville

8. The stations' EEO program reveals that little personnel activity occurred during the 12 month reporting period, *i.e.*, the year prior to filing the renewal application. With respect to recruitment, the program shows contacts with the local newspaper, three educational institutions, two minority organizations, the state employment service, and a temporary services agency. Two minority and seven female referrals resulted. The licensee also explains that the stations had little turnover during the license term. Fifteen of the stations' 25 full-time employees have worked at the stations for seven years or more.[3]

9. The petitioners do not dispute the licensee's factual claims. Nonetheless, they request an inquiry to determine whether the stations' "consistently low minority employment" occurred because of an internal ceiling of one person in the upper-four job categories and whether the turnover rate was indeed so low as to prevent additional minority employment. The licensee responds that the petitioners offer nothing but speculation. Moreover, the licensee states that it proposes to contact four additional recruitment sources in the event a vacancy occurs during the coming year.

10. Additional information supplied by the licensee supports its contentions. For the period beginning January 1, 1985, and ending December 1, 1988 (the end of the license terms), the stations hired only three persons to full-time upper-level jobs, two white females and one white male. Recruitment took place for two of the positions, generating more than 10 applications (including some from minorities) for each opening. The third hire, made in October 1988, occurred when the stations created a position to take advantage of a person with "experience and background both in country music and in sales." All other full-time upper-level openings were filled by promoting part-time employees. The persons promoted included seven white males and two white females. The licensee also explains that the only minority holding an upper-level job began employment with the stations in a clerical job and worked her way up to an on-air job. The licensee recognizes that she is the only minority in an upper-level position, but insists that is not by design. In this regard, the licensee notes that it has sent recruitment letters periodically and in connection with specific job openings.

11. We find that the licensee's record does not warrant designation for hearing. It is undisputed that there were few openings. Nonetheless, the stations made efforts to secure minority referrals for two of the three openings. In our view, the evidence before us does not raise a substantial and material question of fact that the licensee has engaged in intentional discrimination.[4]

12. We have also determined that no administrative action or further inquiry is warranted in view of the limited number of hiring and promotional opportunities, the recruitment of minorities, and the employment of minorities throughout the term. *See Delaware Broadcasting Co.*, 102 FCC 2d 133, 138-40 (1985); *Chicago Metropolitan Broadcast Stations*, 89 FCC 2d 1031, 1040-41 (1982). However, the stations should consistently make efforts to secure minority referrals for openings and are reminded to do so in the future.

Stations WEAC/WAGI (FM), Gaffney

13. The stations' EEO program indicates that, during the 12 month reporting period, the stations contacted two educational institutions, three minority community leaders, and the employment security commission for referrals. In addition, the program reflects that the stations encouraged employees to refer minority and female job candidates. Of the referrals received, four were minorities and five were women. The stations note their difficulty in attracting minority applicants but claim that the difficulty does not stem from lack of efforts, noting that additional minority leaders were contacted without success. However, in the upcoming license term, the stations plan to contact schools in neighboring counties to increase minority referrals. Although the stations' EEO program suggests that recruitment contacts were made and referrals obtained, the licensee reports that no hires occurred during the reporting year and that the only promotion went to a white male.[5]

14. NBMC/NAACP criticize the licensee for not using minority media, schools or organizations as referral sources. Noting that the stations did not hire anyone during the reporting year, NBMC/NAACP seek an inquiry because of the absence of minority employees throughout the license term. Moreover, they speculate that some opportunities to hire minorities for full-time jobs must have occurred.

15. In opposition, the licensee argues that the stations had few openings during the license term and that the stations repeatedly, although without much success, contacted local minority leaders, including petitioner NAACP.[6]

16. In response to a staff inquiry, the licensee reports that, during a four year period ending May 1988, the stations hired only four full-time employees,[7] recruiting for only one of them. Moreover, only one opening indicates consideration of more than one candidate.

17. We have concluded that the licensee's recruitment and hiring practices do not warrant designation for hearing. The record indicates that the licensee made some efforts to solicit job applicants from minority sources,[8] and there is no evidence of intentional discrimination. *Compare, Beaumont*; *Bilingual*. However, the licensee did not regularly seek out minority referrals for full-time job openings. Considering the limited number of hiring opportunities, four over a four year period, and the licensee's recognition that additional efforts to recruit

minorities were necessary, we do not believe that the imposition of sanctions or remedies is appropriate. The licensee should, however, use potential sources of minority applicants to obtain referrals when job vacancies occur and analyze its recruitment efforts on a regular basis and modify them if appropriate.

Stations WODE/WNOK - FM, Columbia[9]

18. The stations' EEO program indicates that the licensee contacted a variety of recruitment sources, including minority organizations and local colleges. However, female and minority referrals were obtained only from newspaper advertisements and the stations' employees. During the twelve month reporting period (July 15, 1987, to July 15, 1988), the stations hired 15 persons, including one minority. The 10 hires for upper-level positions included one minority. Finally, the licensee acknowledges that its recruitment contacts generated few referrals but attributes the small number to the "technical nature" of the jobs available during the reporting period.[10]

19. NBMC/NAACP argue that the stations did not obtain any referrals from the minority recruitment sources listed in the stations' EEO program because the sources were not contacted frequently or intensively. They also contend that the consistently low level of minority employment, despite the reported high turnover, indicates that a ceiling on the number of minority employees exists.

20. In opposition, the licensee insists that it has sent recruitment letters to numerous educational institutions and minority and women's organizations, and that it follows up by sending quarterly updates of open positions. The licensee recognizes, however, that its efforts often did not result in minority referrals.

21. In reply, NBMC/NAACP question whether recruitment letters were actually sent for each job opening. The licensee seeks leave to respond and submits its response for our review. The response makes clear that the licensee did send recruitment letters to minority sources for each job vacancy.[11]

22. Although the licensee's submissions clearly indicated that it made efforts to recruit minorities and women, the submissions also raised questions about the extent of the licensee's self-assessment. Accordingly, the staff asked the licensee to supply specific hiring and applicant information and explain the extent of any analysis of its EEO efforts.[12] The licensee's response reveals that it filled 37 full-time jobs between January 1, 1985, and December 1, 1988. Of the 37 hired, 14 were women and two were black. The 31 persons hired for upper-level jobs included eight women and the two blacks. The response reflects that recruitment records existed for all but one of the jobs filled. The stations did not maintain records of the race or sex of unsuccessful applicants.

23. We find that the licensee's record does not warrant designation for an evidentiary hearing. The licensee's submissions indicate that the stations endeavored to recruit women and minorities for all available positions. Thus, we do not conclude that the licensee's EEO program was languishing. Moreover, the information reflects that the stations hired women and minorities and employed them, in both the overall and the upper-four job categories, throughout the license term. Accordingly, we conclude that there is no evidence that the licensee imposed a ceiling on minority employment at the stations, or otherwise intentionally discriminated against minorities, as alleged by NAACP/NBMC. *Compare, Beaumont; Bilingual.* However, the licensee did not keep track of the race of applicants until the end of the license term. Such records are essential to timely and appropriate self-assessment. Had appropriate self-assessment occurred, the licensee would have discovered before the summer of 1988 that its recruitment and/or hiring process needed modifications. Considering the small number of referrals received, and the lack of information about the race or sex of job applicants, it does not appear that the licensee engaged, or was in a position to engage, in self-assessment of its EEO efforts. Accordingly, reporting conditions will be imposed. *See Application of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988) (*WXEL-TV and WNFT-TV*), and *Application of Greater New Orleans Educational Television Foundation*, 3 FCC Rcd 1923 (1988) (*WYES-TV*).

Stations WSPA/WSPA - FM, Spartanburg

24. The stations' EEO program states that recruitment efforts included newspaper advertisements, use of five local colleges, the state employment service, and contacts with local minority leaders and various other persons involved in broadcasting. The licensee acknowledges, however, that its records do not reflect how many of its referrals were minorities. Nonetheless, the stations' 12 hires during the reporting period did include one minority, a black male hired for a full-time news reporter/announcer position. The licensee also reported that, as of July 15, 1988, shortly before the filing of the renewal applications, the stations' 29 full-time employees included three (or 10.3%) minorities while their 24 upper-level employees included two (or 8.3%) minorities.[13]

25. NBMC/NAACP charge the licensee with negligence in adherence to its EEO program because its minority employment had declined over the last several years. *See* n.13, *supra*. NBMC/NAACP question whether the licensee's contacts with local minorities were for the purpose of obtaining referrals. Finally, the petitioners contend that the one minority the stations do employ in an upper-level job works the night shift, which they describe as the "least desirable professional position at the station[s]."

26. In opposition, the licensee acknowledges that its EEO efforts were probably adversely affected by frequent management turnover during the license term, but the stations now have managers who are both experienced and successful as to EEO obligations. The licensee also affirms that it contacted the sources listed in the stations' EEO program to obtain referrals, and it supplies the affidavit of one of the persons listed.[14] Finally, the licensee explains that the minority professional who works at night does so in order to attend college during the day.

27. Additional information supplied by the licensee indicates that, while some recruitment efforts were undertaken during the period of low minority employment, the stations did not focus on whether their contacts were generating applications from qualified minority applicants. The records reflect that from mid-1985 until early 1988, the stations' applicant pools contained few, if any, black applicants for the 26 full-time positions filled during this period. Further, no minorities were selected for any of these positions. In addition, the stations often did not maintain the records of recruitment contacts. Finally, the licensee failed to engage in adequate self-assessment of

its overall efforts. Beginning in February 1988, however, the stations increased their efforts and began to obtain applications from blacks on a regular basis.

28. In our view, the instant record does not warrant designation for hearing. There is no evidence of intentional discrimination. *Compare, Beaumont; Bilingual.* However, we cannot ignore the substantial period when the licensee's efforts appear to have been inadequate. Licensees must review continually and promptly correct, if necessary, their EEO programs. *Carolina Christian Broadcasting, Inc.*, 3 FCC Rcd at 1910. That did not occur here. In *Carolina Christian Broadcasting, Inc.*, the licensee experienced a significant decline in minority employment between 1985 and 1986, yet proposed no corrective action plan until the filing of a renewal challenge. That licensee received reporting conditions. *Id.* at 1909-10. Here, the licensee filled 26 full-time jobs and went some 30 months without a meaningful assessment of the results of its recruitment efforts. In view of the period of time involved and the substantial number of hiring opportunities, we conclude that the stations' deficiencies are more serious than those sanctioned in *Carolina Christian Broadcasting, Inc.* and those sanctioned in *WLIT/WYAV - FM*, 4 FCC Rcd 5214 (1989) (where recruitment efforts were claimed for 16 of 36 full-time jobs and three of 36 hires were black in a market where the labor force included 19.4% minorities). Because these stations employed minorities during the license term and contacted minority specific sources[15] for some available jobs, we find that this situation is similar to the record we considered in *Station WROV*, 4 FCC Rcd 6157 (1989). Thus, the same sanctions and remedies are warranted. Accordingly, we will impose reporting conditions and a forfeiture in the amount of $5,000 for repeated violations of Section 73.2080(c)(5) of the Commission's Rules.

Stations WKZQ/WKZQ - FM, Myrtle Beach

29. The EEO program shows that the stations used newspapers and trade publications, local schools and their own employees when seeking out job applicants. These recruitment contacts resulted in numerous female referrals but only two minority referrals for the 18 jobs filled during the 12 month reporting period which ended June 30, 1988. The 18 hires included one minority.[16]

30. The petitioners contend that the stations did not use any specialized minority sources and that the program reflects no affirmative efforts and almost no minority employment despite a high turnover rate. In opposition, the licensee contends that its efforts resulted in the hiring of numerous women and minorities. In this regard, the licensee claims that 14% of its full-time hires for 1987 and 1988 were minorities.

31. An inquiry was made as to the licensee's efforts to locate minority applicants for upper-level jobs during the license term. The licensee's response reveals that 39 full-time upper-level hires occurred between December 1, 1981 and December 1, 1988. For the 39 hires, the licensee reported using recruitment sources in at least 12 instances; however, the licensee had records of the composition of only seven applicant pools. Minorities were in only three of those seven pools. The licensee states that the sources used included newspapers, the University of South Carolina, radio and employee referrals. Also, the licensee reports that advertisements were placed in *Radio and Records* and *The Gavin Report* throughout the license term. The stations hired only one black into an upper level job, a former employee, three months before filing their renewal applications. The licensee contends that it analyzed the stations' efforts annually and it reminded managers responsible for hiring of the Commission's affirmative action requirements.

32. In view of the foregoing, it is apparent that the stations' EEO efforts during the license term were deficient. First, the record fails to establish that the licensee maintained adequate documentation to know the full extent to which minority referrals were received and minorities were in applicant pools. The absence of such documentation means that the licensee was not in a position to monitor or assess the stations' EEO performance in any substantial or meaningful manner. Second, the record establishes that the licensee engaged in insufficient efforts to recruit and consider minorities for the 39 full-time upper-level vacancies that occurred during the seven-year license term. In fact, based on the licensee's response to our inquiry, it would appear that the majority of the subject 39 positions were filled without resort to the use of any recruitment sources. Third, only three of 39 applicant pools could be verified by the licensee as including minorities. Fourth, the licensee failed to modify its program, notwithstanding that the licensee had not been successful in obtaining minority applicants for the subject vacancies, for which no minority hires occurred during the first six and one half years of the license term. Overall, the insufficiency of the licensee's efforts, coupled with their obvious lack of results, warrants the imposition of significant sanctions and remedies.[17]

33. WKZQ/WKZQ-FM's overall affirmative action performance appears to be as deficient as the record of the licensee in *Kansas City Youth for Christ, Inc.*, 3 FCC Rcd 6866 (1988) (*Kansas City*), but better than the record of the licensee in *Stations WSBY/WQHQ - FM*, FCC 89-165 (released: June 9, 1989). *Kansas City* was granted a short-term renewal, subject to reporting conditions, and a $10,000 forfeiture. The Kansas City licensee did not have an EEO program but did hire minorities for 2 of 19 full-time vacancies in an area where minorities constituted 14% of the labor force. *WSBY/WQHQ - FM* were granted a short-term renewal, subject to reporting conditions, and a $15,000 forfeiture. *WSBY/WQHQ - FM* generally did not follow their EEO program, hired no minorities for any of the 33 full-time vacancies in an area where minorities constituted 19.1% of the labor force, and their existing minority employees left the stations. By comparison, in an area where minorities constitute 19.4% of the labor force, the licensee here generally did not follow its EEO program, did not use recruitment sources which produced minority referrals, did not hire any minorities for upper-level positions in a 6 1/2 year period, and did not take corrective action until the end of the license term. However, unlike the stations in *WSBY/WQHQ - FM*, the stations in the present case did attract at least some minorities into its applicant pool and hired one minority and promoted another to an upper-level job while employing minorities in lower-level jobs throughout the license term.

34. Accordingly, we will grant renewal for less than a full term and require the submission of EEO reports. Also, for the apparent repeated failures to comply with the Commission's affirmative action provisions as set forth in Sections 73.2080 (b)(3), (b)(5), (c)(2) and (c)(5) of the Commission's Rules, we will impose a forfeiture in the amount of $10,000. Finally, we will require submission of

a new EEO program which details those steps the licensee proposes to take when job vacancies occur and establishes procedures to review the effectiveness of those efforts. *E.g., Alabama/Georgia Broadcast Stations*, 95 FCC 2d 1, 8-9 (1983).

Stations WGSN/WNMB, North Myrtle Beach

35. The EEO program reveals that the stations obtained two minority referrals from newspaper advertisements but did not obtain any from two local schools during the reporting year. During the August 1, 1987, to August 1, 1988 reporting period, the stations' 12 hires included one minority. None of the four upper-level jobs the stations reported filling during the reporting period went to a minority and the stations' two promotions went to whites.[18]

36. The petitioners fault the stations for not using minority recruitment sources and for not demonstrating any affirmative efforts. In opposition, the licensee claims that additional recruitment sources were contacted, naming the state Department of Labor, the Carolina School of Broadcasting, and the South Carolina Broadcasters Association, local and national publications as well as other South Carolina newspapers.

37. During the four year period ending in May 1988, the licensee's records indicate that recruitment efforts were made for only 11 of the 27 jobs. Only two of the applicants were black. The recruitment sources used do not appear to include any which are specifically directed toward minorities. The stations hired 27 new full-time employees, none of which were minorities. Nine of the 27 jobs filled during the EEO program reporting period were upper-level jobs. There is no indication that the licensee engaged in self-assessment to determine the effectiveness of its recruitment efforts.[19]

38. We find that the stations' record does not warrant designation for hearing. The stations did employ blacks in significant positions through 1986, and there are no substantial and material questions concerning the departure of those employees. *Compare, Beaumont.* However, while there is no evidence of discrimination, the sustained absence of efforts to seek out black applicants accompanied by the decline in black employment indicates a lack of compliance with our rules. There is nothing in the licensee's renewal application EEO program which suggests that the licensee took note of the virtual absence of minority referrals during the four years preceding the filing of the renewal applications or that the licensee would have, absent the petition to deny, modified its efforts. In sum, the information before us indicates that the licensee repeatedly failed to comply with the recruitment and self-assessment obligations required by Sections 73.2080(c)(2), (3) and (5) of the Commission's Rules, and we find that the stations' record is similar to the record of *WKZQ/WKZQ - FM, supra*. Accordingly, we find it necessary to impose a forfeiture in the amount of $10,000 as well as reporting conditions. In addition, we will grant renewal for less than a full-term. We would also have required the filing of a new EEO program; however, subsequent to the filing of the petition to deny, the licensee submitted a revised EEO program which included several minority recruitment sources.

39. Accordingly, IT IS ORDERED, that the petition to deny filed by the named South Carolina branches of the NAACP and the informal objection filed by the National Black Media Coalition ARE DENIED.

40. IT IS FURTHER ORDERED, that the license renewal applications for Stations WESC/WESC-FM and WEAC/WAGI-FM ARE GRANTED.

41. IT IS FURTHER ORDERED, that the license renewal applications for Stations WODE/WNOK-FM, AND WSPA/WSPA-FM ARE GRANTED, subject to the EEO reporting conditions specified herein.

42. IT IS FURTHER ORDERED, that the license renewal applications for Stations WKZQ/WKZQ-FM, and WGSN/WNMB ARE GRANTED FOR A SHORT TERM ending August 1, 1992, subject to the EEO conditions specified herein.

43. IT IS FURTHER ORDERED, that, pursuant to Section 503 of the Communications Act of 1934, as amended, this document constitutes a Notice of Apparent Liability for forfeiture of $5,000 for the licensee of Stations WSPA/WSPA-FM, $10,000 for the licensee of Stations WKZQ/WKZQ-FM and WGSN/WNMB.[20]

44. IT IS FURTHER ORDERED, that the licensee of Stations WKZQ/WKZQ-FM submit within 30 days of the release of this *Memorandum Opinion and Order and Notices of Apparent Liability* an original and one copy of an amended EEO program, specifying the steps it proposes to take to increase the number of applications from minorities and specifying the procedures to be established to review the effectiveness of EEO efforts.

45. IT IS FURTHER ORDERED, that the licensees of Stations WODE/WNCK-FM, WSPA/WSPA-FM, WKZQ/WKZQ-FM and WGSN/WNMB file an original and one copy of the following information on August 1, 1990, August 1, 1991 and on August 1, 1992:

(a) For each report, a list of all job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[21]

(b) a list of employees as of the August 1, 1990 payroll period for the first report and as of the August 1, 1991 and August 1, 1992 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the 12 - month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In additions, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

46. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to the licensee as well as counsel for National Black Media Coalition, and the NAACP.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The National Black Media Coalition (NBMC), headquartered in Washington, D.C., is a national association of black organizations and persons seeking additional black employment, program service and ownership in the media.

[2] This *Memorandum Opinion and Order and Notices of Apparent Liability* will address the EEO efforts of the following stations: WODE (File No. BR-880719UM) and WNOK-FM (File No. BRH-880719UD), Columbia, licensed to Audubon Broadcasting Company, Inc.; WEAC (File No. BR-880706UA) and WAGI(FM) (File No. BRH-880706YB), Gaffney, licensed to Gaffney Broadcasting, Inc.; WESC (File No. BR-880727UE) and WESC-FM (File No. BRH-880727YE), Greenville, licensed to Broadcasting Company of the Carolinas; WKZQ (File No. BR-880728UB) and WKZQ-FM (File No. BRH-880728YE), Myrtle Beach, licensed to Grand Strand Broadcasting Corp.; WGSN (File No. BR-880719UF) and WNMB(FM) (File No. BRH-880719YE), North Myrtle Beach, licensed to Ogden Broadcasting of South Carolina, Inc.; and WSPA (File No. BR-880729UL) and WSPA-FM (File No. BRH-880729YK), Spartanburg, licensed to The Spartan Radiocasting Company.

On November 1, 1988, the National Black Media Coalition and various branches of the NAACP (NBMC/NAACP) filed a petition to deny against 35 radio stations, including the above-listed stations, located in the states of North Carolina and South Carolina. The petitioners have since withdrawn their petitions against nine stations. The staff has, pursuant to delegated authority, renewed two of the nine applications and is reviewing three others. The Commission has acted on an additional four finding that, despite the withdrawal of the petition, the licensee's efforts warranted sanctions. *See Stations WGBR and WEQR - FM*, 4 FCC Rcd 1621 (1989) and *Stations WTMA and WSSX - FM*, 4 FCC Rcd 7834 (1989). The remaining stations in North Carolina and South Carolina will be addressed separately.

[3] Greenville is one of the two main cities in the Greenville-Spartanburg MSA. That labor force includes 43.5% women and 16.0% minorities (14.8% blacks). The stations' Annual Employment Reports show that there were between 23 and 25 full-time employees during the license term. All but two held jobs in the upper-four job categories. For all years but 1983, the reports reflect two minorities (both blacks) overall and one minority upper-level employee. In 1983, three minorities held full-time jobs; one held an upper-level job.

[4] In a late filed pleading, the petitioners submit that *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989), dictates that the proper reference point for determining whether discrimination has occurred is not the overall number of minorities in the labor force, but the number of minorities in the labor force who possess the skills necessary to perform the job in question. The petitioners also note that the use of the *Wards Cove* analysis reduces the number of minorities in the labor force for purposes of statistical analysis, thereby making it more difficult for a petitioner to establish a prima facie statistical showing of discrimination. While the petitioners disagree with *Wards Cove*, it maintains that the challenged stations warrant designation for hearing notwithstanding the stricter standard.

We note that *Wards Cove* dealt specifically with Title VII of the Civil Rights Act, 42 U.S.C. Section 2000e-2(a), not the FCC's EEO rules. With respect to statistical disparities in the employer's workforce, the Court stated that a plaintiff seeking to establish a *prima facie* case of discrimination under Title VII must establish a causal link between specifically identified employment practices (*e.g.*, nepotism, rehire preferences, lack of objective hiring criteria) and any observed statistical disparity. *Id.* at 2124. The petitioners have not identified a specific practice at any of the challenged stations which could have resulted in the alleged statistical disparity. Therefore, we conclude that, even if the principles set forth in *Wards Cove* are applicable outside the Title VII context, the petitioners have not established a *prima facie* case of discrimination against any of the stations herein sufficient to warrant designation for hearing.

[5] Gaffney is located in Cherokee County. The labor force for the county includes 44.2% women and 18.1% minorities (16.9% blacks). The stations' Annual Employment Reports for 1982 through 1988 show that the full-time staff ranged between 11 and 13 employees, of whom all but one were upper-level employees. The employment data reflect no full-time minorities.

[6] The licensee's pleading includes copies of recruitment letters sent in 1987 and 1988, affidavits from local NAACP members affirming the stations' attempts to solicit job applicants, and copies of employment applications from various job candidates.

[7] One of the listed "hires" was in fact a promotion of a part-time employee to a full-time position. Thus, our discussion of the licensee's hiring activities does not include the promotion.

[8] While we believe the use of minority referral sources is an important step in a licensee's efforts to obtain minority referrals and applicants, use of such specific sources is merely one of several steps that can be taken to achieve a meaningful pool of minority referrals and applicants. In fact, it is possible for a licensee to have sufficient minority referrals and applicants without using minority specific sources. Thus, if a licensee obtains a meaningful pool of referrals and applicants from *e.g.*, *exclusive* reliance on general sources, it will not be faulted for failing to contact minority specific sources. On the other hand, where a licensee does not obtain meaningful results from general sources and the licensee also has failed to contact minority specific sources, questions will be raised concerning the extent to which the licensee has engaged in adequate efforts to obtain minority applicants.

[9] By letter dated August 2, 1989, NBMC/NAACP withdrew their petition against WODE/WNOK-FM. However, for the reasons noted herein, we conclude that administrative remedies are necessary. *E.g.*, *Michigan and Ohio TV Stations*, 3 FCC Rcd at 6949 n.2.

[10] The Columbia MSA labor force includes 46.3% women and 25.8% minorities (24.1% blacks). The stations' license term Annual Employment Reports show between 21 (1983) and 26 (1985 - 86) full-time employees and between 21 and 24 upper-level employees. The stations employed two blacks, both holding upper-level jobs, for each year except 1984. In that year, one black upper-level employee is listed.

[11] Although the licensee's response is not contemplated by the rules (*see* Section 73.3584(b)), we will grant the licensee's petition for leave to file the response and consider the response inasmuch as the response fully resolves NBMC/NAACP'S factual allegation about the frequency of the licensee's recruitment contacts.

[12] The licensee was also requested to describe the duties of the black female classified as an official. In its response, the licensee reported that she was the stations' Traffic Manager, responsible for handling traffic and billing as well as supervising the stations' receptionist.

[13] The Spartanburg labor force includes 43.5% women and 16.0% minorities (14.8% blacks). The stations' license term employment reports reveal that the stations employed between 32 and 36 persons in full-time positions. Employment in the upper-four job categories varied between 24 and 31 persons. During the license term, nearly half of the stations' full-time employees and generally a third of the stations' upper-four employees were women. The reports also reflect that, during the early years of the license term (1982-1985), the stations employed minorities, including blacks as follows: 1982 (11.8%), 1983 (16.7%), 1984 (12.9%), 1985 (9.1%). However, between 1985 and 1986, the stations' minority component dropped from three (9.1%) to two (6.1%) in overall jobs and three (10.3%) to one (3.4%) in upper-level jobs and remained at two (5.7%) overall and one (3.2%) upper-level for both 1987 and 1988.

[14] The licensee submitted an affidavit from Cheryl Harleston, Community Relations Director for the City of Spartanburg, who avers that she did supply referrals following recruitment contacts from the stations.

[15] *See* note 8, *supra*.

[16] Horry County, which includes Myrtle Beach, has 46.3% women and 19.4% minorities (17.9% blacks) in its labor force. The stations' full-time staff varied between 16 and 22 employees, while the upper-level staff varied between 14 and 18 employees. Throughout the 1981 - 1988 license term, the stations employed two blacks in lower-level positions but none in upper-level positions until the end of the license term. The stations also reported employing a Hispanic in an upper-level job in 1988.

[17] While we are mindful of the licensee's statement that it analyzed the stations' efforts annually and reminded managers responsible for hiring of the Commission's affirmative action requirements, we also note that such analysis and reminders did not lead to changes in the licensee's EEO effort despite the apparent failings of these efforts as noted above.

[18] North Myrtle Beach is located in Hory County. As previously noted, that labor force includes 46.3% women and 19.4% minorities (17.9% blacks). The licensee's Annual Employment Reports for the stations reveal an initial increase from 19 full-time employees in 1983 to 22 employees in 1985. For those three reports (1983, 1984 and 1985), two of the stations' employees were black. Both were categorized as upper-level employees. After 1985, however, the stations' size and black full-time employment declined. In 1986, one of the 17 full-time (one of 16 upper-level) employees was black, while in 1987, none of 16 full-time employees was black. By 1988, the stations had only 15 full-time employees and 13 upper-level employees. None were black.

[19] While the difference between the upper-level hires reported in the EEO program (four) and the response to our inquiry (nine) is significant, we believe there was no intent to deceive which would warrant further inquiry. Both submissions showed that all of the hires were white and that efforts were adequate with regard to females but questionable with regard to minorities. *Cf. Metrogeneral Communications of Nashville, Inc.*, 99 FCC 2d at 260-61.

[20] In regard to the forfeiture, the licensees may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in an attachment to this *Memorandum Opinion and Order* and *Notices of Apparent Liability*. Any comments relating to ability to pay should include those financial items set forth in the noted attachment.

[21] Such a list might start: 1) News Director: Officials and Managers; Full-time. 3 Applicants: 1 white female, A.W.R.T.; 1 black male, Urban League; 1 black female, NAACP. Sources Contacted - Local Newspaper, A.W.R.T., Urban League, and NAACP. Selected - black male (03/15/91).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 12, 1990

CONTEL OF CALIFORNIA, INC.
SECTION 214 APPLICATION

and File No. W-P-C-6575

REQUEST FOR WAIVER
OF THE
TELCO/CABLE CROSS-OWNERSHIP RULES

Contel of California, Inc. (Contel) has filed an application for authority under Section 214 of the Communications Act, 47 U.S.C. § 214, to construct a broadband fiber optic network in Rancho Las Flores, a new community near Hisperia, California, for the provision of telephone, cable television, video, and enhanced services. Contel requests a waiver of the telephone company/cable television cross-ownership restrictions of Section 63.54 of the Commission's rules, 47 C.F.R. § 63.54, and Section 613(b) of the Cable Communications Policy Act of 1984 (Cable Act), 47 U.S.C. § 533(b), in order to provide tariffed "Fiber Optic Video Service" to an affiliate, ContelVision.

Contel states that its proposal will provide information on (1) the economic and technical feasibility of competition in the provision of video programming services, and (2) the efficacy of regulatory safeguards in preventing the abuses the cross-ownership rules were designed to prevent. Contel states that it will conduct significant testing of state-of-the-art and evolving technologies, such as high capacity integrated services, various network topologies, remote powering methods, multiplexing and broadband switching. Contel states that it will offer underlying fiber optic transmission capacity to ContelVision and an independent cable operator at identical tariffed rates, terms and conditions. There will additionally be legal, functional, and accounting separation between Contel and ContelVision, Contel states. Contel states that its proposal meets the standards for "good cause" for waiver under Section 613(b)(4) of the Cable Act, citing *General Telephone Company of California*, 4 FCC Rcd 5693, *appeal pending, National Cable Television Association v. FCC*, Case No. 89-1517 (D.C. Cir. Aug. 28, 1989), and *Telephone Company/Cable Television Cross-Ownership*, 3 FCC Rcd 5849 (1988).

Interested parties may file comments on Contel's application and waiver request on or before **April 16, 1990,** and reply comments on or before **May 15, 1990.** Comments and reply comments should be filed with the Secretary, Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554. A copy should be sent to International Transcription Services ("ITS"), 2100 M Street N.W., Suite 140, Washington, D.C., 20037, the Commission's contractor for public records duplication. A copy of the Contel application and waiver request, and comments and reply comments when filed, can be obtained from ITS at (202) 857-3800. The Contel application and waiver request is, and comments and reply comments will be when filed, available for inspection and copying in the Public Reference Room, Domestic Facilities Division, Room 6220, 2025 M Street, N.W. Washington, D.C. 20554, Monday - Thursday, 8:30 AM - 12:30 PM, 1:30 PM- 3:00 PM, (202) 634-1512.

For further information contact Patrick Donovan, Domestic Services Branch, Domestic Facilities Division, Common Carrier Bureau, (202) 634-1832.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Revisions to Tariff F.C.C. No. 12

Custom-Designed Integrated Services

Transmittal Nos. 2015 and 2139

ORDER

Adopted: March 12, 1990; Released: March 12, 1990

By the Chief, Common Carrier Bureau:

1. By Transmittal No. 2015, filed on January 8, 1990 and scheduled to become effective March 13, 1990, AT&T Communications (AT&T) establishes Virtual Telecommunications Network Service (VTNS) Option 31. Petitions to reject or suspend this offering were filed January 22, 1990 by Williams Telecommunications Group, Inc. (Williams), and January 23, 1990 by MCI Telecommunications Corporation (MCI). MCI also filed, on March 8, 1990, a petition to reject or suspend the subsequent revisions to VTNS Option 31 filed by AT&T under Transmittal No. 2139.[1] AT&T replied to the petitions directed at Transmittal 2015 on February 1, 1990.

2. By Transmittal 2015, AT&T establishes as VTNS Option 31 an arrangement serving the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. The minimum annual charge of $23.6 million, of which $5.3 million must be satisfied by international charges, is based on provision of VTNS for a five-year period, with the initial configuration including 192 Rate Option 1 Measured Remote Ports, and 4 Rate Option 2 Measured Remote Ports, and 940 Measured Ports. The total number of ports may not be decreased below 909 absent specific agreement between AT&T and the customer. The initial quantities of Data Transmission Capabilities (DTCs) provided are 508 at 9.6 kbps or below and 52 at 56 kbps, which similarly may not be reduced below minima of 406 and 40, respectively. The initial configuration also includes 20 duplex Satellite Transmission Capabilities (STCs) at 56 kbps.

3. Williams' petition restates its objections to AT&T's VTNS offerings generally. Its arguments in the instant petition are identical to those described in recent Bureau Orders addressing previous VTNS offerings. *See, e.g.*, AT&T Communications (Transmittal Nos. 1948, 2033, and 2102), DA 90-232, February 16, 1990 (Com. Car. Bur.); AT&T Communications (Transmittal Nos. 1935, 1939, 1955, 1974, 1975, 1976, 1987, and 1988), DA 90-155, February 2, 1990 (Com. Car. Bur.). Accordingly, no extended summary of these contentions is necessary.

4. MCI contends that, assuming the trade press has accurately identified the Marriott Corporation as AT&T's customer for VTNS Option 31, AT&T has supported that option with "flagrant misrepresentations." MCI 2015 Petition at 2. MCI asserts that AT&T's characterization of VTNS Option 31 as having no cross-elastic effect amounts to the claim that AT&T would lose all Marriott business if unable to tariff Option 31, though not all Marriott business was open to competitive bid. *Id.* at 2-3. MCI asserts that Marriott uses AT&T service almost exclusively, so that in fact all of Marriott's outbound switched voice traffic, currently handled by AT&T under its "Hospitality Network Service" offering, will simply be moved to VTNS Option 31 and repriced. *Id.* at 3-4. MCI argues this demonstrates a cross-elastic impact at odds with AT&T's characterization. *Id.* With respect to Transmittal 2139, MCI again disputes AT&T's assertions respecting the cross-elastic character of service provided Marriott, and complains that a change in billing increments made by Transmittal 2139 should have occasioned revisions in AT&T's economic support data. MCI 2139 Petition at 2-3.

5. AT&T replies that Williams has reiterated arguments raised against previous Tariff 12 filings, including assertions that VTNS offerings are not generally available, and violate the Commission's resale policies and private line rate structure guidelines. AT&T Reply at 1-2. As to MCI's contentions, AT&T states its projection of lost demand absent Option 31 is based on the "initial customer's explicitly stated intention" to seek alternative services from other vendors, and confirmed by its independent analysis which indicated a "real risk" that the customer's existing AT&T services could be displaced by competitive alternatives. AT&T Reply at 2 n.*.

6. The Common Carrier Bureau has reviewed AT&T's Transmittal Nos. 2015 and 2139, the petitioners' assertions, and related pleadings. We conclude that no compelling argument has been presented that the tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petitions to reject, suspend, or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 2015 and 2139, filed by MCI Telecommunications Corporation and by Williams Telecommunications Group, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Transmittal No. 2139, filed on March 2, 1990 and also scheduled to become effective March 13, 1990, clarifies satellite provisions of the tariff and consolidates Rate Schedules C and F.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-108

In re Applications of

PALMETTO RADIO, INC. (hereafter "Palmetto")	File No. BPH-880310MA
SHARRON ANNETTE HALEY (hereafter "Haley")	File No. BPH-880310MZ
PAM S. ADKINS & LEE S. SENTER (hereafter "Adkins")	File No. BPH-880310ND
SUMTER RADIO PARTNERS (hereafter "Partners")	File No. BPH-880310NM
IRIS COMMUNICATIONS, INC. (hereafter "Iris")	File No. BPH-880310NS
MARK BRODY d/b/a SUMTER RADIO PARTNERSHIP (hereafter "SRP")	File No. BPH-880310NO (PREVIOUSLY DISMISSED)

For Construction Permit
for a New FM Station
on Channel 234A (94.7MHz)
in Sumter, South Carolina

HEARING DESIGNATION ORDER

Adopted: February 27, 1990; Released: March 19, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *SRP*. The application of SRP was returned as unacceptable for tender by letter dated June 2, 1988. Specifically, it was determined that SRP failed to include a scale of distance in kilometers on the contour map as required by Section V-B, Item 16, FCC Form 301. On June 11, 1988, SRP filed a Petition for Reconsideration and an amendment to its application. The amendment consists of a contour map with the requisite scale.

3. Under the "hard look" doctrine instituted by the Commission in its *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936 (May 13, 1985) ("*Report and Order*"), a petition for reconsideration of a finding of untenderability will lie only when the petitioner can demonstrate that the application met *all* of the tenderability requirements at the close of the window filing period. *See Report and Order*, 50 Fed. Reg. at 19,946; 47 C.F.R. § 1.106(d)(2). The *Report and Order* provides in Appendix D the critical elements that are essential for staff processing in order to determine that an application is substantially complete. If any one of the elements described therein is missing from an application following the close of the applicable window, that application must be returned as not sufficient for tender. Furthermore, resubmission of such application with a curative amendment will not be considered for *nunc pro tunc* reacceptance.

4. Appendix D to the *Report and Order* specifically requires in its list of tenderability criteria that a map must be submitted satisfying the requirements of Item [16], Section V-B and *clearly and legibly* showing the contours and legal boundaries of the community to be served. Such information is essential to the processing of the application to determine the applicant's compliance with city-grade requirements and to permit verification of signal-strength contour predictions. Furthermore, if the information is provided but "on the face of the application visibly incorrect or inconsistent," and the discrepancy cannot be resolved "within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data." 50 Fed. Reg. at 19,946.

5. Contrary to SRP's contention in its petition, the application as originally submitted does not provide the staff a basis for deriving the needed information about the kilometer scale "confidently and reliably, drawing on the application as a whole." As noted in its petition, SRP would have the staff create a scale for the contour map by measuring the distances to nine different communities on the aeronautical map (annex 4.2), and ratioing this scale to fit the contour map. However, this procedure does not produce an accurate transfer of the scale. Maps of different sources (as here) or different editions do not necessarily have features identically situated. Further, it remains an open question as to what separations are to be measured-city boundary to city boundary, center to center, or business district to business district? City boundaries in general may not conform to map symbols. Consequently, the staff cannot accurately create a scale on the contour map by the advocated procedure. Accordingly, the petition for reconsideration filed by SRP will be denied.

6. *Palmetto*. Information before the Commission indicates that Palmetto was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question Palmetto's qualification to be a Commission licensee. Therefore, such issues will be specified and tried against Palmetto in this proceeding.

7. *Haley*. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Haley has not completed Item 4 correctly. Haley's application gives a post office box number as the residence address of Sharron Annette Haley. Accordingly, Haley must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Partners and Adkins would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE AMENDMENTS FILED
Palmetto	November 16, 1988; November 23, 1988; December 12, 1988; December 22, 1988; December 29, 1988; January 9, 1989; January 13, 1989; September 13, 1989
Iris	November 2, 1988

10. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Palmetto.

2. To determine whether Palmetto's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Palmetto possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Partners and Adkins would constitute a hazard to air navigation.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, that the petition for reconsideration filed by SRP IS DENIED.

14. IT IS FURTHER ORDERED, That Haley shall submit an amendment which contains the information required by Section II, Item 4, FCC Form 301, to the presiding Administrative Law Judge within 30 days after this order is released.

15. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

16. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Palmetto and Iris ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance

stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-32

In the Matter of

Amendment of Section 73.202(b),	RM-6954
Table of Allotments,	RM-7051
FM Broadcast Stations.	RM-7077
(Fairmont, North Carolina, Andrews,	RM-7200
Charleston, Elloree and Little River,	
South Carolina)	

ERRATUM

Released: March 19, 1990

By the Chief, Allocations Branch:

1. On February 5, 1990, we released a *Notice of Proposed Rule Making and Order to Show Cause* in this proceeding (DA 90-93). Paragraph 8 proposed four optional plans for channel allotments at Fairmont, North Carolina, Andrews, Charleston, Elloree and Little River, South Carolina. Option II, in paragraph 8, inadvertently omitted two of the four channels currently allotted to Charleston as well as the proposed substitute channel there. In addition, a footnote was omitted. Therefore, Option II is hereby corrected to read as follows:

	Channel No.	
City	Present	Proposed
Little River, South Carolina	--	264A
Charleston, South Carolina	236C, 245C, 264A, 278C	236C, 245C, 263C2, 278C[5]

[5] Channel 263C2 can be allotted to Charleston in this option with a site restriction of either 7.1 kilometers south or 21.4 kilometers southwest.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166,
Phase II, Parts 1 and 2

In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 1990; Released: March 19, 1990

By the Commission:

I. INTRODUCTION

1. In this Order, we resolve most of the remaining issues in this docket.[1] First, we conclude that Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West) have adequately responded to an order to show cause, issued March 27, 1986,[2] which directed those carriers to show cause why they should not refund apparent special access overearnings in four study areas during the period April 1985 to September 1985. Second, we decide that further investigation regarding the special access rate levels of the independent local exchange carriers (Independents) during the period April 1985 to September 1985 and the period October 1985 to December 1986 is not warranted. Third, we terminate our investigation into across-the-board special access mid-course corrections filed by New York Telephone Company and New England Telephone Company (NYNEX), which were effective from August 13, 1986, through December 31, 1986.

II. BACKGROUND

2. Although the Commission terminated the CC Docket 83-1145 investigation of the initial access charges in 1985, it did not resolve all questions with respect to the lawfulness of the special access charges. The Commission accordingly established this docket to examine the remaining questions and imposed accounting orders on the initial special access rates.[3] Various subsequent revisions of special access rates have remained subject to this investigation and the accounting order in this docket.[4]

3. On May 24, 1985, the Common Carrier Bureau (Bureau) released the *Designation Order*[5] in the instant docket, launching the second, more limited special access investigation which the Commission had directed. The *Designation Order* bifurcated this new investigation into issues of rate structure and methodologies in Phase I and issues of rate levels in Phase II, with the latter phase delayed to allow a significant accumulation of actual operating data.

4. By January 1986, actual special access operating data had become available for rate periods extending through November 1985, and the Bureau decided to activate the Phase II investigation of rate levels. On January 17, 1986, the Bureau released the *Data Request Order*,[6] directing the Bell Operating Companies (BOCs) to submit direct cases and actual cost and revenue data covering the entire six-month span of the first period of special access rates, April to September 1985. In addition, this Order directed the BOCs to submit partial data covering the first two months of the second period of special access rates, October 1985 to December 1986.[7]

5. The Bureau bifurcated Phase II of the investigation into separate parts for the rate levels of the BOCs and rate levels of the Independents, respectively.[8] The *Data Request Order* stated that because the BOCs provide over 90 percent of special access and use relatively consistent methodologies and rate structures, investigating BOC tariffs would be more important to customers and more manageable than investigating the special access tariffs of the Independents. The Bureau therefore deferred its request for the Independents' special access data and direct cases until further order.[9]

6. On March 27, 1986, the Bureau released an order to show cause (*US West Show Cause Order*),[10] setting forth the Bureau's findings from review of the BOCs' submissions in response to the *Data Request Order*. The Bureau found that, of all the BOCs, only the US West companies had apparent special access overearnings for the April to September 1985 period. Accordingly, the *US West Show Cause Order* directed US West either to reduce its filed rates in the four study areas with such excess rates of return or to show cause why it should not be required to reduce those rates.[11] On May 1, 1986, US West filed its answer to the order to show cause (US West Response); no other parties filed responsive pleadings.

7. On August 12, 1986, the Bureau released the *NYNEX Order*, concerning certain mid-course corrections filed by the New York Telephone Company and the New England Telephone Company (NYNEX) to these carriers' special access rates for the October 1985 to December 1986 access tariff period.[12] In its filing, NYNEX had stated that the revisions were intended to retarget its special access rates prospectively in light of on-going revenue shortfalls, as evidenced by low earned rates of return in the elapsed portion of the 15-month rate period. The proposed corrections consisted of across-the-board increases to all subclasses of special access service.

8. The television networks, among other petitioners, had challenged the revisions on the ground that the blanket increases improperly failed to take into account service-specific characteristics which would show that NYNEX's television service to them did not contribute to the special access shortfall. In the *NYNEX Order*, the Bureau decided, *inter alia*, to permit the rates to become effective, subject to an investigation of the general lawfulness of across-the-board mid-course corrections. The Bureau decided that this investigation would be incorporated into the instant docket.

III. DISCUSSION

A. *The US West Refund*

1. US West's Contentions

a. Adequacy of a Six-Month Rate of Return Period

9. US West contends that a six-month period is too short to make a meaningful determination of excessive earnings if the rates were in fact targeted at the prescribed rate of return.[13] The brief length of the period is material here, US West argues, because in all four study areas, the period represents "peak earnings periods flanked by valleys within the same calendar year."[14] In addition, US West notes that returns in two of these areas were well below the maximum allowable rate of return for the subsequent period, beginning October 1985 (based on projections from available two-month period data).[15]

10. US West asserts that the Commission has recognized the inadequacy of such brief rate of return periods in our prior use of a 12-month calendar year term in Orders requiring AT&T and its divested operating companies to refund 1978 earnings which exceeded authorized levels.[16] Similarly, US West argues that the Commission has acknowleged the inadequacy of short test periods in adopting a two-year enforcement period in Docket 84-800.[17] In this context, US West cites specific Commission language from the *Docket 84-800 Report and Order* concerning the allowable threshold for triggering refunds. US West says that that language warns of the risk of targeting error and insufficient earnings using periods shorter than two years.[18]

b. Basis for Computation and Implementation of Refunds

11. US West next argues that, to the extent the Commission may lawfully order a refund for the period in question, we must compute and implement that refund only in certain specified ways. First, US West asserts that US West's "actual" return, taking account of decreased earnings resulting from the transition plan the Commission adopted for OCC rates that had been subject to the Docket 20099 settlement agreement,[19] should be the basis of any refund.[20] Second, US West argues that the maximum rate of return for triggering and computing refund liability should be the 13.25 percent adopted in the *Docket 84-800 Report and Order* (*i.e.*, with 50 basis points allowed beyond the 12.75 percent maximum), because the "same notions of fairness" established there are applicable to the present case.[21] Finally, US West implies that the disallowance should be implemented through prospective special access rate reductions, rather than retrospective refunds to identifiable customers.[22]

c. Adjustments to Earnings

12. In addition to the foregoing legal issues, US West asserts that its rates of return in the four study areas are actually lower than reflected in the initial certification contained in its response to the *Data Request Order*, because of certain adjustments which should be made to the earnings reported in that certification.[23]

13. First, US West states that Pacific Northwest Bell has several multi-state LATAs for which its data response failed to reflect the proper booking of revenue and investments to the jurisdictions involved because meet point billing had not yet been completed. US West further states that it has since developed an interim accounting methodology which corrects this deficiency and that one effect of the resulting revisions is to reduce revenues booked to Washington and Idaho, by $116,000 and $112,000, respectively.[24]

14. In addition, US West states that the previously reported booked revenues for Washington and Idaho did not reflect certain out-of-period adjustments resulting from "claims from customers." Appropriate adjustments, it asserts, reduce such revenues for Washington and Idaho by $2,262,000 and $7,000, respectively.[25] According to US West, when these "customer claims" adjustments are combined with the other adjustments discussed above, the rates of return, without recoupment for OCC discounts, are reduced to 12.73 percent for Washington and 7.52 percent for Idaho.[26]

15. Next, US West claims that Nebraska's average investment for the six-month period was understated due to an out-of-period error in its separations information system. According to US West, correction of this error increases May investment from $9.8 million to $16.6 million. US West states that a similar problem resulted in an understatement of South Dakota's federal income tax by $100,000.[27]

16. US West also asserts that revenues in Nebraska were overstated by $600,000 due to double counting in its Carrier Access Billing System and other errors. Similarly, it asserts that revenues in South Dakota were overstated by $245,000.[28] After adjusting revenues and investments to reflect all the foregoing amounts, US West calculates its rates of return for Nebraska and South Dakota, without recoupment for OCC discounts, to be 28.22 percent and 14.90 percent, respectively; with recoupment for OCC discounts, these returns would be 24.86 percent and 13.84 percent, respectively.[29]

17. Based on all the foregoing adjustments, US West concludes that, to the extent it is lawful and reasonable to order any refunds for the period in question, such refunds should be confined to Nebraska. It computes Nebraska's refund, using 13.25 percent as the maximum return and allowing recoupment for OCC discounts, to be $2,146,664, including interest. It further suggests that this refund could be treated as part of the *Docket 84-800 Report and Order* enforcement proceeding, with prospective rate reductions in the special access category.[30]

2. Discussion

18. The question presented here is whether this Commission should exercise its discretion to order refunds where it has been shown that US West's special access rates earned in excess of the authorized return during the six-month period from April through October of 1985.[31] The rates in question were part of a partially new regime and were, in a very real sense, interim in nature. These rates were allowed to take effect at the conclusion of a comprehensive investigation of US West's and other local exchange carriers' initial attempts to tariff interstate access services in accordance with the Part 69 access charge system.[32] US West and all other local exchange carriers were required by the Commission's rules to file revisions

to these rates barely three months after they took effect, revisions which took effect on October 1, 1985.[33] We do not decide here whether a six month period could ever establish an adequate basis to measure compliance with a rate of return prescription. However, we conclude that the record of this proceeding provides adequate justification for refraining to exercise our discretion under Section 204 to order US West to refund special access overearnings realized in the context of the unique circumstances that existed during the six months in question.

B. *Special Access Rate Levels of the Independents*

19. No further action has been taken in Phase II of this investigation concerning the Independents' special access rate levels since the *Data Request Order* bifurcated Phase II between the Independents and the BOCs, and deferred consideration of the Independents' rates indefinitely. As a result, there have been no data submissions on the Independents' rates in this docket for either the April to September 1985 period or the October 1985 to December 1986 period. All of the Independents, however, have submitted data for the entire second period pursuant to our Part 65 reporting requirements, as reported in their Form 492 reports.

20. We conclude that the considerations discussed above regarding US West's essentially interim rates for the April to September 1985 period are also applicable to the Independents' rates for that period. This indicates that the public benefits of blanket data requests and additional investigation on the Independents' rates for the first period would not justify the expenditure of our limited resources. In light of these circumstances, we believe that further investigation of the Independents' special access rates for the first period is not warranted.

21. We also conclude that further investigation of the Independents' special access rates for the October 1985 to December 1986 period is not warranted. The primary purpose for initiating this investigation of the carriers' inaugural special access tariffs was to determine whether there were any widespread structural problems with the new access charge regime. However, the Form 492 earnings reports indicate tht the Independents' average rate of return on special access services during the October 1985 to December 1986 period was approximately 10.7% -- well below the prescribed level of 12.75%. Under these circumstances, we conclude that any remedies for overearnings by individual Independents for that, or any subsequent period, can best be determined in complaint proceedings under Section 208 of the Act, 47 U.S.C. § 208, or in such other proceedings consistent with the District of Columbia Circuit's remand of the Commission's Part 65 enforcement rules.

C. *Across-the-Board Mid-Course Corrections*

22. In the period since the *NYNEX Order*, the Bureau decided not to establish a separate pleading cycle relating specifically to the across-the-board mid-course corrections. The NYNEX rates directly at issue in that Order were in effect only for the brief period from mid-August through December 1986, and were subsequently superseded in NYNEX's 1987 annual access filing. The Commission has, however, examined related questions in the *Strategic Pricing Order* [34] and the *Strategic Pricing Reconsideration Order* [35] in this docket. Moreover, in the *Strategic Pricing Supplemental Order*,[36] recently released in this docket, we have applied the principles and guidelines developed in the *Strategic Pricing Order* and the *Strategic Pricing Reconsideration Order* to many of the very rates that the Bureau had set for investigation in the *NYNEX Order*. We conclude, for the reasons discussed below, that no useful purpose would be served by continuing the investigation of NYNEX's across-the-board special access increases, and accordingly terminate our investigation of those rates.

23. In the *Strategic Pricing Order* and its reconsideration, the Commission concluded, *inter alia*, that it would not be desirable to require an FDC-derived rate of return constraint to define the outer boundary of special access subelement pricing flexibility during the period under investigation. We concluded that for that period, which includes the period in which the NYNEX across-the-board rate increases were in effect, the LECs could appropriately price special access services to achieve objectives in addition to precise cost recovery, as long as there was compliance with certain guidelines. Among these guidelines were that, at a minimum, the overall special access revenue requirement must be recovered at the category level and that the ordinal hierarchy of the special access rate structure must be consistent with the hierarchy of the underlying costs.[37] We concluded with respect to the special access rates under investigation that if the Strategic Pricing Guidelines were satisfied, specific disaggregated costs need not be rigidly correlated with specific rate subelements.

24. The *NYNEX Order* raised essentially the same issues considered and decided in the Strategic Pricing investigation. In the *NYNEX Order*, the Bureau designated for investigation the question of whether a carrier could correct for category level underearnings with an across-the-board adjustment to all special access subelements, even if some of those subelements were earning at a rate in excess of the return prescribed for the special access category as a whole. Any claim that a subelement overearned would, of course, depend upon the methodology used to allocate costs by subelement. Thus, the question determinative of both issues is the same, namely, whether the Commission should necessarily evaluate the reasonableness of special access subelement rates by examining on a subcategory basis the cost allocations underlying the subelement rates.

25. Our *Strategic Pricing Order* and *Strategic Pricing Reconsideration Order* have resolved, for the relevant period, the issue raised in the *NYNEX Order* of whether LECs were necessarily required to set special access rates on the basis of rigid subelement cost allocations. They were not. In addition, our *Strategic Pricing Supplemental Order* specifically examined many of NYNEX's rates at issue in the *NYNEX Order* and found them to be lawful.[38] In reaching this conclusion, this Commission found that NYNEX did not overearn in the special access category during the period covered by the *NYNEX Order*, and that NYNEX maintained an ordinal hierarchy of special access rates that was consistent with its hierarchy of underlying costs. These findings suggest that the existence of any unlawful cost allocations for other special access rates during the relevant period is, at most, uncertain, and any consequent revenue impact, minimal. The fact that the rates set for investigation in the *NYNEX Order* were only in effect for a short period underscores this latter point regarding the limited revenue impact of any possible cost misallocations. In light of all these circumstances, we conclude that expenditure of Commission resources in further investigation of the rates subject to the *NYNEX*

Order would not be in the public interest. Accordingly, we terminate that portion of the investigation in the instant docket.

IV. ORDERING CLAUSES

26. THEREFORE, IT IS ORDERED that Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company have satisfied their burden under the order to show cause described herein, released March 27, 1986, and therefore are not liable for the refunds specified in the March 27, 1986, Order.

27. IT IS FURTHER ORDERED, that the investigation of the special access rates of the independent local exchange carriers for the period April 1, 1985, to September 31, 1985, and the period October 1, 1985, to December 31, 1986, as described herein, IS TERMINATED.

28. IT IS FURTHER ORDERED, that the investigation of across-the-board mid-course corrections for special access rates, as described herein, IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] All remaining questions relate to Shared Network Facility Agreements and the Commission's Docket 20099 investigation, which were remanded to the Commission for further proceedings by court order. *See* MCI Telecommunications Corporation v. FCC, 842 F.2d 1296 (D.C. Cir. 1988); Western Union Telegraph Company v. FCC, 815 F.2d 1495 (D.C. Cir. 1987). Those issues will be resolved by separate order.

[2] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Mimeo No. 3436, released Mar. 27, 1986 (Com.Car.Bur.).

[3] *See* Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, FCC 84-524, released Nov. 9, 1984 (*November 9 Order*); Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, released Mar. 8, 1985 (*Cost Order*).

[4] *See e.g.*, Annual 1985 Access Tariff Filings, Mimeo No. 7401, released Sept. 30, 1985 (Com.Car.Bur.) at para. 138; Annual 1987 Access Tariff Filings, 2 FCC Rcd 280 (Com.Car.Bur. 1986) at paras. 93, 96.

[5] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Mimeo No. 4726, released May 24, 1985 (Com.Car.Bur.) (*Designation Order*).

[6] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Mimeo No. 2057, released Jan. 17, 1986 (Com.Car.Bur.) (*Data Request Order*).

[7] The Bureau permitted the BOCs to base their responses to the *Data Request Order* for the April to September 1985 period on September 1985 data alone, conditioned on their certification that these data were representative of the entire six-month period. *Id.* at para. 4B.

[8] *Id.* at paras. 9-10.

[9] *Id.* at para. 10.

[10] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Mimeo No. 3436, released Mar. 27, 1986 (Com.Car Bur.).

[11] *Id.* at paras. 20-1. The *US West Show Cause Order* determined US West's excess earnings, which were expressed only as excess rates of return, as follows: for Northwestern Bell's South Dakota study area, 17.76 percent, and for its Nebraska study area, 34.68 percent; for Pacific Northwest Bell's Washington study area, 17.26 percent, and for its Idaho study area, 22.59 percent. The Bureau now estimates that the total overearnings are approximately $5.8 million, including interest, attributable primarily to Nebraska and Washington.

[12] New York Telephone Company, Transmittal No. 774, New England Telephone and Telegraph Company, Transmittal No. 818, Mimeo 6324, released Aug. 12, 1986 (Com.Car.Bur.) (*NYNEX Order*).

[13] US West Response at 3-7.

[14] *Id.* at 7.

[15] *Id.* at 4.

[16] After an inquiry into AT&T's earnings during calendar year 1978, the Commission ordered AT&T and the divested BOCs to refund to consumers, through prospective rate decreases, $101 million, the amount by which the carriers' 1978 earnings had exceeded the maximum rate of return prescribed for them. AT&T Earnings on Interstate and Foreign Services During 1978, 49 Fed. Reg. 49502 (Dec. 20, 1984), *reconsideration*, FCC 85-284, released May 30, 1985, *further reconsideration*, FCC 85-573, released Oct. 30, 1985, *aff'd sub nom.*, New England Tel. & Tel. Co. v. FCC, 826 F. 2d 1101 (D.C. Cir. 1987).

[17] The Commission adopted rules for the measurement and enforcement of compliance with rate of return prescriptions in Docket 84-800 that became effective October 1, 1985. Authorized Rates of Return for Interstate Services of AT&T and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527, released Sep. 30, 1985 (*Docket 84-800 Report and Order*) *reconsideration*, FCC 86-114, released Mar. 24, 1986 (*Docket 84-800 Reconsideration*), *reversed and remanded in part sub nom.*, American Tel. & Tel. Co. v. F.C.C., 836 F.2d 1386 (D.C. Cir. 1988).

[18] US West Response at 5 (citing *Docket 84-800 Report and Order* at paras. 9, 15). US West also suggests that the period originally adopted in the *Docket 84-800 Report and Order*, June 1985 to December 1986, included a four-month overlap with the six-month period in the instant case (*i.e.*, June to September 1985) and that the *Docket 84-800 Reconsideration* deleted those four months from the enforcement period because those four months represented an "unreliable time period for review of a carrier's earnings." US West Response at 6-7.

[19] *See November 9 Order* at paras. 85-104; *Cost Order* at paras. 37-44. The transition plan raised the Docket 20099 settlement rates to full cost rates by charging the OCCs an increasing percentage of the BOCs' full cost rates, implemented at six-month intervals over a two-year period. The Commission determined that the BOCs would not be permitted to recoup the resulting revenue reductions from other special access rates.

[20] US West's position is inconsistent. In its primary discussion of the effect of the transition from 20099 rates, US West appears to say that its objection to the plan's requirement was being pursued in the United States Court of Appeals but not in the present proceeding. US West Response at 7-8. Elsewhere in its pleading, however, US West recomputes a version of the refund based on its own assumptions, which uses its "actual" return,

i.e., takes account of reduced earnings from OCCs attributable to the transition from 20099 rates. *See id.* at 15, and Attachments D and E.

[21] *Id.* at 9-10.

[22] *Id.* at 15-16.

[23] In its response to the *Data Request Order*, US West certified that its September 1985 data were representative of the entire six-month period. *See* note 7, *supra*.

[24] *Id.* at 10-11, and Attachments A and B.

[25] *Id.* at 11-12, and Attachment B.

[26] *Id.* at 12.

[27] *Id.* at 13.

[28] *Id.* at 14.

[29] *Id.* at Attachments D and E.

[30] *Id.* at 16. *But cf. id.* at Attachment G, wherein US West calculates potential refund amounts in South Dakota on the same basis as above to be $67,341; US West's position appears to be that South Dakota's rate of return for the period beginning October 1985 is below 12.75 percent, and it therefore has been "prospectively refunding" the excess already. *Id.* at 13.

[31] This investigation was initiated under Section 204 of the Act, which grants the Commission authority to investigate rates. Section 204 also grants the Commission broad discretion in fashioning remedies if it finds as a result of investigation that particular rates are not justified, including discretion to determine whether, and on what basis, refunds should be ordered. *See* 47 U.S.C. § 204(a).

[32] *See Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082, 1085 (1984). The Part 69 access charge system established a single, uniform mechanism for recovering local exchange carriers' costs of originating and terminating interstate and foreign telephone calls. *See MTS and WATS Market Structure*, 93 FCC 2d 241, on *reconsideration*, 97 FCC 2d 682 (1983).

[33] *See* Annual 1985 Access Tariff Filings, Mimeo No. 7401, released Sept. 30, 1985 (Com.Car.Bur.).

[34] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, 4 FCC Rcd 4797 (1988) *(Strategic Pricing Order)*.

[35] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Order on Reconsideration, 5 FCC Rcd 400 (1990) *(Strategic Pricing Reconsideration Order)*.

[36] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, 5 FCC Rcd 412 (1990) *(Strategic Pricing Supplemental Order)*.

[37] *Strategic Pricing Order*, at 4 FCC Rcd 4803, para. 58.

[38] *Strategic Pricing Supplemental Order*, 5 FCC Rcd at 412-13, paras. 7-9. In particular, that Order specifically concluded that NYNEX's rates for high capacity service (HiCap) and digital data service (DDS) were lawful during the relevant period.

Before the
Federal Communications Commission
Washington, D.C. 20554

TELESCRIPPS	CSR-3342
CABLE COMPANY	KY0108
Glasgow, Kentucky	

Petition for Temporary Stay and
Petition for Temporary Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 1990; Released: March 16, 1990

By the Chief, Video Services Division:

1. On January 3, 1990, Telescripps Cable Company (herein "Telescripps"), operator of a cable television system serving Glasgow, Kentucky filed a "Petition for Temporary Special Relief" and a "Petition for Temporary Stay" of the Commission's program exclusivity provisions, §76.92-76.163 of the Commission's Rules. An "Opposition to Petition for Temporary Special Relief" was filed January 23, 1990, by Blue Grass Television, Inc., licensee of Television Broadcast Station WBKO (ABC, Channel 13), Bowling Green, Kentucky, and Telescripps filed its reply on February 20, 1990.

2. In support of its request, Telescripps notes that it presently serves some 5,000 subscribers in Glasgow, and that it has received requests for syndicated exclusivity protection for various programs (including Cheers, Donahue, M*A*S*H, Star Trek and Oprah Winfrey) from Station WBKO. Absent a waiver, Telescripps is required to afford these programs the protection requested, but a new cable television system in Glasgow, owned by the Glasgow Municipal Electric Plant Board (herein "EPB"), is not presently required to blackout these programs pursuant to §76.95(a) and §76.156(b) of the Commission's Rules, since it only serves 500 subscribers. Therefore, Telescripps maintains that it is at a significant competitive disadvantage, and it requests a waiver of the program exclusivity rules until such time as the EPB system serves 1,000 subscribers or more and becomes subject to the same program exclusivity provisions. Telescripps claims that, absent a waiver, EPB will gain numerous subscribers simply due to the fact that it will be able to carry programs that Telescripps will be forced to delete, but that these subscribers will not switch to Telescripps once EPB is subject to the same exclusivity provisions. Telescripps claims that this situation defeats the Commission's goal of enhancing the broadcaster's image and revenue while promoting competition. In addition, Telescripps notes that §76.65(a) of the Commission's former signal carriage rules specifically permitted all cable systems serving the same community to carry the same television signals in order to assure their equality in competing for subscribers in the same community. Furthermore, Telescripps argues that its circumstances are unique and were not considered by the Commission when it exempted systems with fewer than 1,000 subscribers on the bases that they do not generally compete head-to-head with larger systems for subscribers and that the expense involved in deleting programs would constitute a greater relative burden for small systems. In this instance, Telescripps maintains that it is competing head-to-head with the new cable system, and it is not suggesting that the other system be required to purchase anything to delete programs.

3. Citing *Virginia Petroleum Jobbers Assoc. v. FPC*, 259 F. 2d 921, 925 (D.C. Cir. 1958), as modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.* 559 F. 2d 841, 843 (D.C. Cir. 1977), Telescripps repeats most of the above arguments in support of its request for temporary stay, claiming that it will suffer irreparable harm if EPB is allowed to attract subscribers by operating in Glasgow carrying programs that Telescripps cannot provide. At the same time, Telescripps notes that no local broadcaster will be substantially harmed as a result of the temporary stay requested since the total television audience in the Bowling Green ADI is approximately 45,500 television households, while Telescripps only serves 5,000 subscribers. Finally, Telescripps maintains that it is in the public interest to promote competition by maintaining a competitive balance in Glasgow, and that it is likely, therefore, to succeed on the merits of its petition for special relief.

4. In its opposition to Telescripps' petitions, Station WBKO notes that the new cable system serving Glasgow already has over 800 subscribers, and that according to its manager, it will exceed 1,000 subscribers within a few months. Moreover, according to WBKO, exempting Telescripps' system from the program exclusivity provisions in a market with only 50,000 households would hardly be insignificant since this would affect more than 10% of WBKO's potential audience. Furthermore, WBKO notes that while it previously agreed to Telescripps' request for a brief delay in providing the requested exclusivity protection in Glasgow following the rules' effective date, January 1, 1990, not only has Telescripps failed to comply with the rules until now, but it also attempted to file its waiver petitions on the last possible date, December 29, 1989, and even then failed to provide proper service pursuant to §76.7(b) of the Commission's Rules. Finally, WBKO notes that when the Commission adopted the *Memorandum Opinion and Order in Gen. Docket No. 87-24*, 4 FCC Rcd 2711, 2728-2729 (1989), it specifically rejected a suggestion that the exemption for cable systems having fewer than 1,000 subscribers be extended include any other cable system operating in the same community on the bases that the costs of compliance are relatively less for the larger systems, and they generally are not in direct competition for subscribers with the smaller system in any event.

5. In reply, Telescripps reiterates its request for stay, adding that it has now received the requisite equipment to comply with WBKO's request for syndicated exclusivity protection, and that it is now providing that protection. Furthermore, Telescripps notes that it would have filed its waiver petition earlier, but it waited until after the United States Court of Appeals issued a decision denying the request for rehearing on these rules on December 12, 1989.

6. In the Commission's decision in *Memorandum Opinion and Order in Gen. Docket No. 87-24*, para. 93, *supra*, the Commission addressed the issue of expanding the under 1,000 subscriber exemption to any other cable system operating in the same community. Therein the Commission noted that ordinarily two cable systems do not

compete for the same subscribers. Consequently, Telescripps maintains that the Commission never addressed its particular situation since it is in direct head-to-head competition for subscribers with EPB. We find Telescripps' claim to be unfounded. While the Commission did note that usually two systems would not be in direct competition in the same community, it went on to find that even if competition between two systems existed, the small advantage the smaller system obtained did not warrant exempting the larger system. In this regard, it stated:

> Moreover, one of the reasons for exempting these small systems was to avoid placing upon them equipment costs that would have a greater comparative impact, on a per subscriber basis, than the costs the larger system would incur. In light of this greater relative burden, we do not believe that the marginal competitive advantages these smaller systems might gain under the exemption justify revoking the exemption.

Docket No. 87-24, 4 FCC Rcd at 2728-2729. Telescripps has failed to demonstrate that, in this instance, EPB will enjoy more than the marginal competitive advantage comtemplated by the Commission. In this regard, Telescripps' main contention revolves around its concern that it will lose new subscribers to the competing cable system, EPB, since EPB is exempted from the exclusivity rules. However, it is highly unlikely that this competition will substantially injure Telescripps since, according to Commission records, Telescripps already has a penetration rate of more than 88% in Glasgow. Further, any potential future impact upon Telescripps will be mitigated by the fact that once the new system attains 1,000 subscribers it will lose its exemption, and it will have to comply with the Commission's syndicated exclusivity and network nonduplication rules, just as any other co-located exempted cable system which exceeds the 1,000 subscribers. Lastly, as WBKO notes, Telescripps' failure to provide it network nonduplication protection for which WBKO has bargained with program suppliers, will considerably diminish the value of the rights it has obtained under the Commission's network nonduplication rules. Given the above considerations, Telescripps has failed to demonstrate any reason why it is in the public interest to grant either its "Petition for Temporary Special Relief" or its "Petition for Temporary Stay".[1]

7. In view of the foregoing, we find pursuant to §0.283 of the Commission's Rules, that denial of Telescripps' petitions for temporary special relief and for temporary stay is in the public interest.

8. Accordingly, IT IS ORDERED, that the "Petition for Temporary Special Relief" filed January 3, 1990, by Telescripps Cable Company IS DENIED.

9. IT IS FURTHER ORDERED, that the "Petition for Temporary Stay" filed January 3, 1990, by Telescripps Cable Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

FOOTNOTE

[1] In any event, whether or not WBKO may suffer some negative economic impact from grant of the requested waiver is now irrelevant since the Commission no longer considers potential lack of economic impact upon local stations as justification for granting waivers of the network nonduplication rules. *Report and Order in Gen. Docket No. 87-24*, 3 FCC Rcd 5299, 5320 (1988), *aff'd in part and modified in part*, 4 FCC Rcd 2711 (1989), *aff'd sub nom. United Video, Inc. v. FCC*, 890 F. 2d 1173 (D.C. Cir. 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG DISTANCE SERVICE OF WASHINGTON, INC.,
Complainant,

v.

NEW YORK TELEPHONE COMPANY,	File No. E-89-350
BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-89-351
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-89-352
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-89-353
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-89-354
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-89-355
DIAMOND STATE TELEPHONE COMPANY,	File No. E-89-356
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-89-357
CONTEL OF VIRGINIA, INC.,	File No. E-89-439

Defendants.

ORDER

Adopted: March 12, 1990; Released: March 16, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 19, 1989, Long Distance Service of Washington, Inc. (the "complainant") filed the above-captioned formal complaints alleging that the defendants charges for interstate access services for the period January 1, 1987 through December 31, 1987 yielded earnings in excess of the Commission's prescribed rate of return. The defendants filed answers and motions to dismiss the complaints on November 2, 1989.

2. On November 27, 1989, the complainant filed motions for leave to withdraw the complaints predicated upon the Commission's decision in *MCI Telecommunications Corporation v. Southern Bell Telephone and Telegraph Company*, 4 FCC Rcd. 8135 (1989). In that decision, the Commission held that the rates of return earned by local exchange companies must be examined over the entire two year monitoring period, in this case, January 1, 1987 through December 31, 1988, to determine whether an unlawfully high rate of return had been earned. The instant complaints are based on alleged overearnings for the year 1987 only and complainant now requests leave to withdraw the complaints without prejudice to it's right to file revised complaints based on the applicable two-year monitoring period. The defendants neither support nor oppose the complainant's motions.

3. After careful review of the pleadings in this matter, we grant the complainant's motion.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that complainant's motions for leave to withdraw complaints ARE GRANTED without prejudice and these proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re applications of

BELL TELEPHONE COMPANY OF PENNSYLVANIA — File No. 21432-CD-P/ML-1-85

For authority to construct and operate an additional facility in the Public Mobile Service on frequency 152.84 MHz for Station KGH861 at Pleasantville, New Jersey

B.L. HILL d/b/a ANSWER NEW JERSEY — File No. 22905-CD-P/L-1-85

For authority to construct and operate a new one-way facility in the Public Mobile Service on frequency 152.84 MHz at Atlantic City, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 1990; Released: March 19, 1990

By the Chief, Mobile Services Division:

I. BACKGROUND

1. Bell Telephone Company of Pennsylvania (Pennsylvania Bell) and B.L. Hill d/b/a Answer New Jersey (Hill) filed the captioned, mutually exclusive applications to operate and construct one-way facilities on frequency 158.10 MHz in the Public Land Mobile Radio Service. *See Public Notice*, PMS No. 16-15, Mimeo No. 6624 (released August 23, 1985). The Pennsylvania Bell application proposed a one-way paging facility for its Station KGH861 in Pleasantville, New Jersey, and Hill has proposed a new one-way paging facility in Atlantic City, New Jersey. On September 18, 1985, Hill filed a petition to deny Pennsylvania Bell's application on the grounds that the application did not contain a traffic loading study,[1] and Pennsylvania Bell filed a responsive pleading. In addition, on June 6, 1986, Pennsylvania Bell filed a petition for waiver of the traffic loading requirements. Responsive pleadings were filed. On November 8, 1989, the application of Pennsylvania Bell was selected first in a random selection drawing. *Public Notice* No. PMS-32-4 (released November 13, 1989).

II. TRAFFIC LOADING REQUIREMENTS

A. Contentions

2. In its petition, Hill states that New Jersey Bell Telephone Company (New Jersey Bell), a sister company of Pennsylvania Bell, provides one-way paging service in the Pleasantville and Atlantic City, New Jersey area. Pennsylvania Bell's captioned application proposes a transmitter collocated with New Jersey Bell's Pleasantville location. Hill argues that Pennsylvania Bell's application must, therefore, be considered as a request for an additional channel by Bell Atlantic, the parent corporation of both New Jersey Bell and Pennsylvania Bell, requiring the submission of a traffic loading study pursuant to Sections 22.525 and 22.516 of the Rules. Failure to submit the required traffic load study, Hill argues, renders the application defective and unacceptable for filing.

3. In opposition, Pennsylvania Bell argues that no rule bars it from filing an application for a new facility in its own name, notwithstanding that its affiliate is licensed for a station with a service area which overlaps the proposed facility. In particular, Pennsylvania Bell argues that Sections 22.525(d) and (f) of the Rules[2] do not expressly include affiliates' stations within the term "existing station." Pennsylvania Bell cites *In re Amendments of Parts 2 and 22 of Commission's Rules to Allocate Spectrum in 928-941 MHz Band*, 92 F.C.C.2d 631 (1982), in support of its argument that the Commission intended to consider only "incumbent paging licensees" and "existing carriers" in its requirement that a traffic load study be supplied in applications for additional channels. Pennsylvania Bell argues that it and its New Jersey affiliate are each licensees and common carriers within the meaning of Sections 153(c) and 153(h) of the Communications Act, 47 U.S.C. 153(c), 153(h), and that there is no support for attributing the stations of one to the other. Moreover, Pennsylvania Bell argues that its parent Bell Atlantic holds no licenses and has not applied for any facilities in its own name, and that therefore Bell Atlantic is not a "licensee," a "carrier," or an "applicant" subject to Section 22.525. Accordingly, Pennsylvania Bell argues that a traffic loading study is not required for its captioned application. Elaborating on this theme in its Petition for Waiver, Pennsylvania Bell argues that "well-settled principles of corporation law" mandate "separate treatment of parent corporations and wholly-owned subsidiary corporations." Petition for Waiver at 7.[3]

4. Pennsylvania Bell further argues that acceptance of Hill's argument that a traffic loading study is required would change the established interpretation of Section 22.525 without notice or opportunity for comment in violation of Section 553(b) of the Administrative Procedure Act (APA), 5 U.S.C. Section 553. Although Pennsylvania Bell acknowledges that the APA does not require notice and comment before adopting interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice, it argues that none of these exceptions is applicable here because "the actual validity of [its] application and its ability to provide paging services would be determined by the rule change." Opposition at 7 n.18.

5. In reply, Hill argues that Pennsylvania Bell's interpretation of Part 22 of the Rules is contrary to Commission policy and case precedent. The Commission has recognized, Hill contends, that the traffic loading requirements of Sections 22.525 and 22.516 of the Rules[4] could

be circumvented by different corporate entities controlled by the same parent filing separate applications. Hill asserts that the real party in interest provisions of Section 22.13(a)(1) of the Rules[5] were adopted to prevent an applicant from filing numerous applications in the same geographical area under different names.[6]

B. Discussion

6. We find that since Pennsylvania Bell and New Jersey Bell are wholly-owned by Bell Atlantic, Pennsylvania Bell is required to file a traffic loading study of New Jersey Bell's existing station at Pleasantville, New Jersey with its captioned application.

7. *License ownership*. Section 22.13(a)(1) requires that an applicant report affiliates on its Form 401. (*See* note 5, *supra*). The reason for this rule can be found in the *First Report and Order*, 51 Rad. Reg. 2d (P&F) 882, 901 (1982), as clarified in *Real Party in Interest, supra*. The reporting requirements in Section 22.13 are designed "to prevent an applicant from filing numerous applications in the same geographic area under different names." 52 Rad. Reg. 2d at 1053. The entity which has ownership of the applicant and/or the proposed station, or the entity which will be in a position to control, actually or potentially, the operation of the station, is the entity considered to be the actual licensee or applicant. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *Hearne Mobilephone*, 61 Rad. Reg. 2d (P&F) 32 (Com. Car. Bur. 1986); *KWOL, Inc.*, 49 F.C.C.2d 962 (Rev. Bd. 1974). Bell Atlantic wholly-owns both Pennsylvania Bell and New Jersey Bell. It is in a position to control both companies. Thus, Bell Atlantic is the owner of both entities' applications and licenses.[7]

8. *Traffic Loading Study*. The traffic loading requirements for one-way channels are contained in Sections 22.525, 22.516 and 22.16 of the Rules. Section 22.525 of the Rules provides that for applications filed prior to January 1, 1986, an applicant for a new one-way signaling station may request only one channel, and that a public need demonstration is not required. *See* Section 22.525(a). An applicant for an additional one-way channel must demonstrate public need by complying with the traffic loading requirements of Section 22.516 of the Rules. *See* Section 22.525(f).[8] The captioned applications were filed well before the January 1, 1986 sunset.[9] As noted above, New Jersey Bell has an existing one-way paging station in the area proposed to be served by Pennsylvania Bell. Thus, since Pennsylvania Bell and New Jersey Bell are commonly owned, Pennsylvania Bell was required to file a traffic loading study for New Jersey Bell's existing station.

9. Moreover, Pennsylvania Bell's argument that to apply the requirements of Section 22.525 to its application is a violation of the APA, is rejected. Given the Commission's pronouncements when establishing the Section 22.13 reporting requirements (see paragraph 7, *supra*), Pennsylvania Bell did have notice that the additional facilities it proposes to construct at the site of an affiliate's similar facilities would be subject to rules pertaining to additional facility applications, specifically, the traffic loading requirements of Section 22.525, 22.516, and 22.16 of the Rules.

III. REQUEST FOR WAIVER

A. Contentions

10. Assuming *arguendo* that it was required to file a traffic loading study, Pennsylvania Bell requests a waiver of the traffic loading requirements. Pennsylvania Bell asserts that in the *Fourth Report and Order*, 97 FCC 2d at 953, 958 (1984), the Commission retained the traffic loading requirements for applications for additional one-way paging frequencies filed before January 1, 1986 to encourage competition. Pennsylvania Bell argues that the application of the traffic loading requirements to its application would frustrate competition in the Atlantic City area. In support of its argument, Pennsylvania Bell asserts that there are currently several radio common carriers offering wide area paging service in the Philadelphia, Pennsylvania and Atlantic City, New Jersey area. If it is to compete effectively, Pennsylvania Bell asserts, it must offer similar services offered by its competitors. In light of these circumstances, Pennsylvania Bell argues that grant of its application would foster competition in the Atlantic City area, and requests that the Commission grant its petition for waiver.

11. In opposition, Hill argues that the appropriate time for Pennsylvania Bell to request a waiver of the traffic loading requirements was when the application was originally filed. Hill argues that Pennsylvania Bell may not now cure a defective application after the cut-off date has passed and the application has been processed by the Commission. In addition, Hill states that the Atlantic City paging market is already a competitive one. Moreover, Hill rejects Pennsylvania Bell's suggestion that competition in the Atlantic City area requires the presence of a wireline company, and further notes that New Jersey Bell, a wireline, does provide paging service in that area. Accordingly, Hill urges that Pennsylvania Bell's petition for waiver be denied, and Pennsylvania Bell's application be dismissed.

12. In response, Pennsylvania Bell argues that Section 1.3 of the Rules allows for waiver of the Commission's rules and regulations "at any time" upon a showing of good cause. Pennsylvania Bell further argues that Section 22.19 of the Rules does not require a petition for waiver at the time the application is originally filed. In addition, Pennsylvania Bell reiterates its argument that the entrance of a new firm into the Atlantic City paging market would enhance competition and serve the public interest by providing an alternative source for paging service on a wide-area basis, and thus, would serve the underlying purpose of the traffic loading requirements.

B. Discussion

13. In order to demonstrate that a waiver of Sections 22.16 and 22.516 of the Rules is justified, an applicant must make an affirmative showing that the underlying purpose of the rule to be waived would not be served by applying it in a particular case, or that there are unusual and unique facts or circumstances which would render application of the rule unduly burdensome or otherwise contrary to the public interest. Pennsylvania Bell has failed to present sufficient justification for its request for a waiver of the traffic loading requirement. Moreover, Pennsylvania Bell failed to file a traffic loading study with its waiver request, as required by Section 22.19(b) of the Rules.

14. Pennsylvania Bell supports its request for waiver by arguing that grant of its application would promote competition in the Atlantic City area. Although it is true that the Commission sought to encourage competition by adopting the traffic loading requirements for an additional channel on an existing one-way system in the *Fourth Report and Order*, 97 FCC 2d at 957, it also determined in that Order that the public interest would be served by the use of loading studies at least until all interested parties had an opportunity to apply for paging frequencies. *See* note 9, *supra*.

15. In this case, Pennsylvania Bell has not supported its request for waiver of the traffic loading requirements. Pennsylvania Bell filed its application for an additional one-way station one year before the traffic loading requirements sunset, and did not include the loading studies in its application. Pennsylvania Bell has not demonstrated that the underlying purpose of the rule would be frustrated by its application in this case. On the contrary, in this case, denial of the waiver would prevent an affiliate of an existing licensee from requesting facilities for which it cannot demonstrate any public demand, a policy which was in effect at the time it filed its application. In addition, Pennsylvania Bell has not demonstrated that the underlying purpose of the ownership reporting requirement (Section 22.13) is frustrated by dismissal of its application, and has not demonstrated unique or unusual circumstances in the ownership or control of its station that would cause us to disregard its ownership by Bell Atlantic and its affiliation with New Jersey Bell.

16. In accordance with the policy in effect prior to January 1, 1986, Hill was entitled to file its application for a new one-way paging facility without competing with an applicant for an additional facility which does not demonstrate the need for the additional channel. The addition of Hill with a competing facility in the Atlantic City area promotes competition by allowing a new entrant to operate in this area. Therefore, denial of the waiver does promote competition in accordance with Commission policies.

17. For the foregoing reasons, we are dismissing Pennsylvania Bell's application. In addition, based on our review of application filed by Hill, we find Hill to be legally and technically qualified to operate its proposed paging facility at Atlantic City, New Jersey, and that the grant of its application is in the public interest.

IV. ORDERING PARAGRAPHS

18. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules that the application of Pennsylvania Bell Telephone Company, File. No. 21432-CD-P/ML-1-85 IS DISMISSED;

19. IT IS FURTHER ORDERED, that the Petition to Deny the Pleasantville application filed by B.L. Hill d/b/a Answer New Jersey IS GRANTED;

20. IT IS FURTHER ORDERED, that the application of B.L. Hill d/b/a Answer New Jersey, File No. 22905-CD-P/L-1-85 IS GRANTED, subject to its obtaining FAA clearance.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Hill simultaneously filed a Motion for Late Acceptance of its Petition. Bell of Pennsylvania filed an Opposition, and Hill filed a Reply. Hill filed its Petition six months after Pennsylvania Bell's captioned application was filed, but within thirty days of a New Jersey Bell application which noted the pending Pennsylvania Bell application. Hill argues that the captioned application did not adequately disclose the location of the proposed station facility and hence that the Petition should be accepted even though it is late. We reject Hill's argument. The Commission's public notices include the latitude and longitude of all proposed transmitter sites. This is sufficient to put interested parties on notice of the exact location of the proposed facilities. However, due to the public interest nature of the arguments raised by Hill, we will consider his petition as an informal pleading pursuant to Section 1.41 of the Rules.

[2] Sections 22.525(d) and (f) of the Commission's Rules state:

> (d) An applicant for an additional channel must demonstrate the need for it by submitting a traffic load study pursuant to Section 22.516.
>
> * * *
>
> (f) In the cases where the pending or newly filed applications do not involve the 900 MHz band, an applicant requesting a new one-way signaling station will be deemed to be requesting additional frequencies for its existing station if either (1) the transmitter location specified in the new application is within the Service area of the existing station, or (2), there is an overlap of 50 percent or more between the service areas of the existing and proposed facilities.

[3] Pennsylvania Bell cites American Bell Inc. v. Federation of Telephone Workers of Pennsylvania 736 F.2d 879 (3d Cir. 1984); Miles v. American Telephone & Telegraph Co., 703 F.2d 193 (5th Cir. 1983); Boise Cascade Corp. v. Wheeler, 419 F. Supp. 98 (S.D.N.Y. 1976), *aff'd* , 556 F.2d 554 (2d Cir. 1977).

[4] Section 22.516 of the Commission's Rules states in pertinent part:

> (a) Traffic loading studies shall be required in the following cases:
>
> (1) Applications which request an additional frequency for an existing one-way signalling station . . . .

[5] Section 22.13(a)(1) of the Commission's Rules states in pertinent part:

> (a) Each application for a radio station authorization or for consent to assignment or transfer of control shall:

> (1) Disclose fully the real party or parties in interest, that are engaged in the Public Mobile Services, including the following information:
>
> * * *
>
> (ii) A list of its affiliates, if any. Affiliates means any business which holds a five per cent or more interest in the applicant, or any business in which a five percent or more interest is held by another company which holds a five per cent interest in the applicant. . . .

[6] Hill cites Public Notice, *Real Party in Interest*, 52 Rad. Reg. 2d (P&F) 1053 (1982).

[7] Pennsylvania Bell's argument that the Commission should not pierce the Pennsylvania Bell corporate veil to find Bell Atlantic is inapposite. The legal theory of piercing the corporate veil is based on a theory of limited liability of shareholders for corporate actions, *American Bell Inc. v. Federation of Telephone Workers of Pennsylvania*, 736 F.2d at 886, and it arises when there is a question of contractual obligations, *id.*, or liability in tort, *Miles v. American Telephone & Telegraph Co.*, *supra*, or fraud, *Boise Cascade Corp. v. Wheeler*, *supra*. Here, there is no issue of liability for corporate actions. Rather, the issue is control of a communications license. The Commission has always considered control to be vested in those who own and/or define the policy of the radio station. *See San Joaquin*, *supra*, and cases cited therein.

[8] Pursuant to Section 22.16 of the Rules, applicants who filed applications for a single additional channel after January 1, 1986 are not required to show traffic loading on their existing system. Section 22.16 was amended to eliminate these requirements in Regulatory Policies and Procedures for DPLMRS (*Fourth Report and Order*), 97 F.C.C.2d 953, 958 (1984). However, the captioned applications were filed prior to January 1, 1986.

[9] In establishing a sunset provision for the paging traffic loading requirements, the Commission stated:

> . . . [W]e . . . believe that for the interim we should use loading studies to encourage competition during the first few years these channels are available. Loading studies will encourage new businesses to enter markets and prevent existing licensees from requesting facilities they do not need, either because their demand will not support new channels for the forseeable future or because they only wish to preempt new entrants. After all interested parties have had an opportunity to apply for paging frequencies, we do not see any need to continue using loading studies.
>
> Fourth Report and Order, 97 F.C.C.2d at 958.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-132

In the Matter of

Amendment of Section 73.202(b), RM-6705
Table of Allotments,
FM Broadcast Stations.
(Whitewater, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 6, 1990; Released: March 20, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of Caribbean Broadcasting Corporation (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 4828 (1989), proposing the allotment of Channel 293A to Whitewater, Wisconsin, as that community's second local FM service. Petitioner filed supporting comments restating its intention to apply for the channel. State Long Distance Telephone Company ("SLDTC") filed supporting comments. SLDTC also states its intention to apply for Channel 293A at Whitewater.

2. Channel 293A can be allotted to Whitewater in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.4 kilometers (4.6 miles) north of the city.[1] The site restriction is necessary in order to avoid a short spacing to Station WTWV(FM), Channel 294B at Des Plaines, Illinois.

3. We believe the public interest would be served by allotting Channel 293A to Whitewater, Wisconsin, as that community's second local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 4, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Whitewater, Wisconsin	293A

4. The window period for filing applications will open on **May 7, 1990,** and close on **June 6, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates are 42-54-02 and 88-44-01. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-330

In the Matter of

Amendment of Section 73.202(b), RM-6722
Table of Allotments,
FM Broadcast Stations.
(Altoona, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 6, 1990; Released: March 20, 1990

By the Chief, Allocations Branch:

1. At the request of Margaret Keefer (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 6010 (1989), proposing the allotment of Channel 251A to Altoona, Wisconsin, as that community's first local FM service. Petitioner filed supporting comments reiterating an interest in the allotment.

2. We believe the public interest would be served by allotting Channel 251A to Altoona, as that community's first local FM service. The channel can be allotted in compliance with the Commission's minimum distance separation requirements.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 4, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Altoona, Wisconsin	251A

4. The window period for filing applications will open on **May 7, 1990,** and close on **June 6, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The reference coordinates are 44-48-26 and 91-26-49. Because this allotment is made as a result of a petition for Rule Making filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-126

In the Matter of

Amendment of Section 73.202(b), RM-7198
Table of Allotments,
FM Broadcast Stations.
(Livingston, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 6, 1990; Released: March 20, 1990

By the Chief, Allocations Branch:

1. Before the Commission is the request of WLIV, Inc.(petitioner), licensee of Station WXKG(FM), Channel 240A, Livingston, Tennessee, seeking the substitution of Channel 240C3 for Channel 240A at Livingston, and the modification of its license to specify operation on the higher powered channel. Petitioner submits information in support of its proposal.

2. Channel 240C3 can be allotted to Livingston in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.1 kilometers (7.5 miles) southwest of the city.[1] As requested, we shall propose to modify the license for Station WXKG(FM) at Livingston to specify operation on Channel 240C3. In accordance with Section 1.420(g) of the Commission's Rules we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Livingston.

3. In view of the fact that Livingston, Tennessee, could receive its first wide coverage area FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Livingston, Tennessee	240A	240C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 11, 1990,** and reply comments on or before **May 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Harry F. Cole, Esq.
Bechtel, Borsari, Cole & Paxson
2101 L Street, N.W.
Suite 502
Washington, D.C. 20037
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The petitioner specified the restricted site at coordinates 36-18-42 and 85-25-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-127

In the Matter of

Amendment of Section 73.202(b), RM-7203
Table of Allotments,
FM Broadcast Stations.
(Erath, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 6, 1990; Released: March 20, 1990

By the Chief, Allocations Branch:

1. At the request of Solo Music Company (petitioner), permittee of Station KRAR(FM), Channel 299A, Erath, Louisiana, the Commission has before it for consideration a petition for rule making requesting the substitution of Channel 299C3 for Channel 299A at Erath, and the modification of its station's permit to specify operation on the higher powered channel. Petitioner submits information in support of its proposal and states its intention to apply for the channel, if allotted.

2. The proposed substitution can be accomplished in compliance with the Commission's minimum distance separation requirements at the site specified by the petitioner.[1] The proposal is short-spaced to the licensed site of Station KCIL(FM), Channel 298C1, Houma, Louisiana, but clears the site specified in Station KCIL(FM)'s outstanding construction permit. Therefore, we shall delay final action in this proceeding until Station KCIL(FM) is licensed in accordance with the outstanding construction permit.

3. As requested, we shall propose to modify the construction permit of Station KRAR(FM) at Erath, Louisiana, to specify operation on Channel 299C3 in lieu of Channel 299A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Erath.

4. In view of the fact that Erath, Louisiana, and the surrounding area could receive expanded FM service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Erath, Louisiana	299A	299C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 11, 1990,** and reply comments on or before **May 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Keith Frederick
General Partner
Solo Music Company of Louisiana,
Route 1, Box 837A
Erath, LA 70533
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend. Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters; 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 29-57-30 and 92-02-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-128

In the Matter of

Amendment of Section 73.202(b), RM-7202
Table of Allotments,
FM Broadcast Stations.
(Union City, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 6, 1990; Released: March 20, 1990

By the Chief, Allocations Branch:

1. At the request of Twin States Broadcasting (petitioner), the Commission has before it for consideration a petition for rule making requesting the allotment of Channel 289A to Union City, Tennessee, as that community's second local FM channel. Petitioner states its intention to apply for the channel, if allotted.

2. Channel 289A can be allotted to Union City in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.7 kilometers (6.6 miles) north of the city.[1] The site restriction is required in order to provide protection to Station WAKQ(FM), Channel 288A at Paris, Tennessee, and Station WGKX(FM), Channel 290C at Memphis, Tennessee.

3. In view of the fact that Union City, Tennessee, could receive its second local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Union City, Tennessee	285A	285A, 289A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 11, 1990,** and reply comments on or before **May 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Eric S. Kravetz, Esq.
Ward and Mendelsohn
1100 17th Street, N.W.,
Suite 900
Washington, D.C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are 36-31-01 and 89-05-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-198

In re Applications of

DIGITAL PAGING SYSTEMS
OF PHILADELPHIA, INC.

For a Construction Permit File No. 21685-CD-P/L-1-85
for additional two-way facilities
for Station KGI775 to operate on
frequency 454.075 MHz in the Public
Land Mobile Service at Bethlehem,
Pennsylvania

For a Construction Permit File No. 22918-CD-P/L-1-85
for additional two-way facilities for
Station KGI775 to operate on
frequency 454.075 MHz in the Public
Land Mobile Service at Pottstown,
Pennsylvania

POCONO MOBILE RADIO
TELEPHONE COMPANY, INC.

For a Construction File No. 23028-CD-P/ML-3-85
Permit for additional two-way
facilities for Station KDS328 to operate on
frequency 454.075 MHz in the Public
Land Mobile Service at Phillipsburg,
New Jersey; Salisbury Township,
Pennsylvania; and Ironton,
Pennsylvania

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 1990; Released: March 20, 1990

By the Commission: Commissioner Duggan not participating.

1. Pocono Mobile Radio Telephone Company, Inc. (Pocono) has filed an application seeking review of the Mobile Services Division (MSD) action granting the captioned application for additional two-way facilities at Bethlehem, Pennsylvania, File No. 21685-CD-P/L-1-85, filed by Digital Paging Systems of Philadelphia, Inc. (Digital). Pocono has also filed petitions seeking reconsideration of the MSD actions granting the Digital application for additional facilities at Pottstown, Pennsylvania, File No. 22918-CD-P/L-1-85, and dismissing Pocono's applications for various locations in New Jersey and Pennsylvania, File No. 23028-CD-P/ML-3-85, as defective.[1] Responsive pleadings were filed.

I. BACKGROUND

2. Pocono is the licensee of Public Land Mobile Service (PLMS) Station KDS328 on frequency 454.075 MHz at Stroudsburg and Tannersville, Pennsylvania and PLMS Station KNKD990 on frequency 454.550 MHz at Salisbury, Pennsylvania. Digital is the licensee of Public Land Mobile Service (PLMS) Station KGI776 on frequency 454.775 MHz at numerous locations throughout the State of Pennsylvania.

3. On January 30, 1985, Digital filed two applications for authority to construct additional two-way facilities for Station KGI775 to operate on frequency 454.075 MHz, at Bethlehem and at Pottstown, Pennsylvania. Pocono filed three applications for authority to construct additional two-way facilities for Station KDS328 to operate on frequency 454.075 MHz at Phillipsburg, New Jersey; Salisbury Township, Pennsylvania; and Irontown, Pennsylvania on April 29, 1985. Pocono's applications, filed separately but simultaneously, appeared on Public Notice on June 26, 1985 under one file number. By *Lottery Notice*, Mimeo No. 6624 (released August 23, 1985), the Digital and Pocono applications were announced as mutually exclusive and scheduled for lottery.[2] However, Pocono filed a request for comparative consideration of the Digital and Pocono applications, and by *Hearing Designation Order* (HDO), CC Mimeo No.4851 (released June 4, 1986), Erratum, CC Mimeo No. 5183 (released June 16, 1986) (*Notice*, 51 Fed. Reg. 21801, (June 16, 1986), *corrected*, 51 Fed. Reg. 22863 (June 23, 1986)), the applications were designated for hearing on standard PLMS comparative issues.[3]

4. By *Initial Decision* (*ID*), 2 FCC Rcd 2194 (1987), the Administrative Law Judge (ALJ) found Digital's applications to be comparatively superior to those of Pocono, and granted Digital's applications. Specifically, Digital received a very slight preference under issue (a), the nature of service category, and a substantial preference under issue (b), the "comparative need" issue. *See* note 3, *supra*. The ALJ awarded Digital the decisional preference on the "comparative need" issue, in large part, because it became apparent at the hearing that Pocono's Station KNKD990 was already licensed to serve substantially the same areas that Pocono now proposes to serve with Station KDS328, and that Pocono had failed to submit the required traffic loading study for Station KNKD990 pursuant to Sections 22.516 and 22.16 of the Rules.[4] *Id*. at 3-5.

5. Pocono filed exceptions with the Review Board challenging the ALJ's decision on the comparative need issue, and replies were filed by Digital and the Chief, Common Carrier Bureau. At the oral argument held on August 14, 1987, the question was raised whether the Pocono applications should be dismissed as patently defective for the lack of a traffic loading study. Accordingly, in *Order*, 2 FCC Rcd 5320 (Rev. Bd. 1987), the Review Board directed the parties to file comments on this question, and in *Decision*, 2 FCC Rcd 7226 (Rev. Bd. 1987), concluded that Pocono's applications should be dismissed for failure to submit a traffic loading study for Station KNKD990. The Review Board found that although there was a considerably greater than 50% overlap (in fact, almost 100%) between Pocono's proposed reliable service area of Station KDS328 and its existing Station KNKD990, Pocono did not submit the required traffic loading study. *Decision*, 2 FCC Rcd at 7227. Instead, the Review Board continued, "Pocono erroneously claimed that its application simply sought extended or additional service area for its existing

454.075 MHz operation on Station KDS328." *Id.* Accordingly, the Review Board concluded that Pocono's applications failed to demonstrate the existence of sufficient public need for its proposed facilities and was, therefore, fatally defective. The Board believed it was authorized to dismiss Pocono's applications in view of the Hearing Designation Order's total silence on this critical issue and the designating authority's concession of oversight. Nevertheless, out of an abundance of caution, it referred the proceeding to the Bureau for further action in accordance with its decision. *Id.* at 7229.

6. The Review Board further determined that Digital's applications should be granted, and affirmed the ALJ's denial of Pocono's Motion to Reopen Record on the issue of whether Digital's proposed Bethlehem facility causes cognizable interference to Pocono's existing Stroudsburg facility. However, the Review Board left to the Bureau the decision to determine whether Digital's Bethlehem proposal causes objectionable interference and, if so, whether to resolve the interference question by minor amendment or conditional grant of Digital's Bethlehem application. Accordingly, instead of dismissing Pocono's applications and granting Digital's applications, the Review Board referred this proceeding to the Common Carrier Bureau for further action consistent with its decision. *Decision*, 2 FCC Rcd at 7226, 7229.

7. By letter dated December 15, 1987, Pocono requested that the MSD dismiss Digital's application for the Bethlehem facility as defective, stating that the proposed facility would cause harmful interference to its existing co-channel Station KDS328 Stroudsburg facility. In addition, Pocono requested that the MSD waive the requirements of Section 22.516 and 22.16 of the Rules, and grant its application for the proposed facility at Phillipsburg.[5] In support of its request for waiver, Pocono argued: (1) that although the Phillipsburg proposed reliable service area overlaps its existing KNKD990 by more than 50%, "only a small portion of KNKD990 is covered by this proposed facility while approximately 45% of Phillipsburg proposed contour covers an area not reached at all by KNKD990; (2) that it is "strategic" that this proposed facility be a part of the KDS328 system; (3) that there are no reasonable alternatives to the Phillipsburg application; and (4) that its existing subscribers will be served by grant of the application. The MSD denied Pocono's requests by letter dated February 24, 1988 stating that Pocono had not justified its request for waiver of the rules, and dismissed Pocono's application pursuant to the Review Board's finding in *Decision* that the application was defective. The MSD further determined that Digital's proposed Bethlehem facility would cause a slight amount of interference to Pocono's Stroudsburg station. In denying Pocono's request to dismiss Digital's Bethlehem application, the MSD stated that Digital would be required to amend its applications so as not to cause interference to Pocono's Stroudsburg station.

8. By letter dated February 24, 1988, the MSD required Digital to amend its application to eliminate the potential interference to Pocono's Station KDS328. *See* Letter from Kevin Kelley, Chief, Mobile Services Division to Audrey Rasmussen (Counsel for Pocono) (February 24, 1988). On March 9, 1988, Digital filed an minor amendment to its Bethlehem application to reduce the transmitter output power for the facility which would eliminate the objectionable interference to the Stroudsburg facility.[6] Pocono filed a petition to deny the amended application which petition was dismissed by the MSD as an unauthorized pleading. *See* Letter from Kevin Kelley, Chief, Mobile Services Division to Audrey Rasmussen (Counsel for Pocono) (March 22, 1988). In a letter to Pocono dated April 28, 1988, the MSD found, based on its review of the Digital Bethlehem application, as amended, that Digital's application conformed with the rules regarding interference standards, and concluded that no harmful interference would be caused to Pocono's Stroudsburg facility. By *Public Notice*, Report No. PMS 88-35-A (released May 25, 1988), the MSD granted Digital's amended application for the Bethlehem facility.[7]

II. GRANT OF DIGITAL'S APPLICATIONS

A. Contentions

9. In its application for review and petition for reconsideration of the MSD decision to grant Digital's applications, Pocono challenges the grant of Digital's Bethlehem and Pottstown applications on the following substantive grounds. First, Pocono argues that despite Digital's amendment, Digital's Bethlehem facility will cause harmful interference to Pocono's facility at Stroudsburg, and submits an engineering study purporting to demonstrate the existence of harmful interference. Next, Pocono argues that because Digital's application for the proposed Bethlehem facility does not propose the use of a duplexer, the application does not demonstrate the capacity to provide two-way service as required by Commission rule and policy. Pocono further argues that Digital intends to use its Pottstown facility solely for one-way paging services, and submits a Notice of the Pennsylvania Public Utility Commission published in the Pennsylvania Bulletin which states that Digital has filed an application with that Commission for approval to provide one-way radio telephone common carrier service in the City of Pottstown.[8] Accordingly, Pocono argues that the grant of Digital's applications violates Commission policy that two-way frequencies be utilized to offer two-way service, and was, thus, in error.

10. In opposition, Digital states that Pocono has not presented any evidence to support its argument that the MSD's actions were in error. Pocono, Digital asserts, has merely offered an alternative engineering study which does not refute the MSD's determination that Digital's Bethlehem facility will not cause interference to Pocono's facility. Digital further reiterates its intention to offer two-way service at the Bethlehem facility and comply with all applicable policy requirements.

11. Digital further argues that Pocono is not adversely affected by the grant of Digital's Pottstown application, and thus has no standing to challenge its grant.[9] Digital states that its facility will have the technical capacity to offer two-way service and has applied for the requisite state authorization to provide two-way service. In conclusion, Digital urges the Commission to dismiss both Pocono's application for review and petition for reconsideration as without merit.

B. Discussion

12. We have reviewed the proceedings, pleadings, and Digital's applications, and find that Pocono has failed to demonstrate that the MSD erred in granting Digital's applications. With regard to Digital's proposed facility at Bethlehem, the MSD has determined, based on its analysis

of Digital's engineering study and its independent calculations using values from the Commission's data base, that this facility will not cause harmful interference to Pocono's facility at Stroudsburg. In this regard, we note that based on the engineering data that Digital has supplied, Pocono has determined that Digital's proposed facility at Bethlehem will cause harmful interference to Pocono's Stroudsburg facility. Using the data Digital supplied in its application, as amended, we conclude that Pocono's determination is correct. An area of interference would be created between the 240 and 246 degree radials of Pocono's existing Stroudsburg facility. However, in its review of Digital's application, the MSD has determined that the height above average terrain value that Digital has given for the 0 degree radial was in error. The value given, 533 feet, is apparently a typographical error. The correct value, obtained from the Commission's terrain data base is 433 feet. Using this new value for 0 degrees the MSD determined that harmful interference will not be caused to Pocono's facility.[10] Therefore, we find that the MSD's determination was correct.

13. We further find that Pocono has failed to substantiate its assertion that Digital's Bethlehem facility is incapable of offering two-way service upon demand.[11] Although an application may demonstrate the capacity to provide two-way service through the use of a duplexer, the failure to incorporate the use of a duplexer in a transmission system does not automatically indicate that two-way service cannot be provided. For example, two-way service may be provided by a single antenna operating in a half-duplex mode.[12] Further, the licensee could use two separate antennas, one for transmitting and one for receiving. Digital may intend to use two antennas, although that would not necessarily be apparent from the application because Digital need not list receiving antennas. Moreover, the MSD concluded, relying on Digital's representations at the comparative hearing, that Digital intended to offer two-way service at its Bethlehem facility. Pocono has not shown that Digital's representations were not true.

14. Equally unavailing is Pocono's allegation that Digital does not intend to offer two-way service at the Pottstown facility because Digital initially requested authorization from the Pennsylvania Public Utility Commission for one-way service. This Commission has no requirement that its licensees seek state authorization in any particular order or format, so long as the authorization is acquired in a timely manner. Moreover, we note that Digital has now filed for two-way authorization and has reaffirmed in its responsive pleadings its intention to make two-way service available.

III. DISMISSAL OF POCONO' S APPLICATIONS

A. Contentions

15. In Pocono's petition for reconsideration of the MSD action dismissing its applications as defective, Pocono argues that the Commission has all the needed information to determine whether there is sufficient traffic on its Station KNKD990 to justify its request for additional channels. Specifically, Pocono argues that the testimony regarding its two test mobile units on KNKD990 and its submission of held orders for 91 two-way units is equivalent to a sufficient traffic loading study required by Sections 22.16 and 22.516 of the Rules. Pocono further argues that an application may be amended to demonstrate need and, therefore, the MSD erred in dismissing its applications without first requesting that Pocono amend its applications to include the traffic loading study. In addition, Pocono argues that insofar as the MSD did not provide Pocono the opportunity to amend, the MSD erred in denying its request for waiver of Sections 22.16 and 22.516 of the Rules with respect to its application for two-way facilities at Phillipsburg, New Jersey, and erred in denying its request for grant of the Phillipsburg application.

16. In opposition, Digital states that Pocono's arguments concerning Pocono's alternative loading study, and request for waiver were fully considered by the MSD in its February 24 letter, and rejected. Pocono was required to submit a traffic loading study pursuant to Sections 22.16 and 22.516 of the Rules and did not do so. Digital argues that Pocono's petition fails to demonstrate any error in the MSD's decision and, accordingly, does not present valid grounds for granting reconsideration.

B. Discussion

17. Pocono's applications for Station KDS328 propose to serve an area which overlaps its existing Station KNKD990 by more than 50%, and thus Pocono was required to comply with Section 22.16 and 22.516 of the Rules in order to justify a grant of additional channels for its existing two-way system. Section 22.16(b)(2) of the Rules provides that if an applicant's proposed reliable service contour overlaps an existing contour by 50% or more, the application is considered to be a request for an additional channel. Section 22.516 of the Rules provides that an applicant seeking an additional channel is required to submit a traffic loading study for the existing channel. In both the *ID* and *Decision*, the ALJ and the Review Board, respectively, found that Pocono had not filed a traffic loading study. We also find that no traffic loading study was filed. Accordingly, we find that the MSD properly dismissed Pocono's applications for additional facilities at Phillipsburg, Salisbury Township and Ironton on Station KDS328 as defective for failure to submit a traffic loading study.

18. We also reject Pocono's assertion that it has provided sufficient information to the Commission to demonstrate compliance with Sections 22.16 and 22.516 of the Rules. Pocono was required to file a study demonstrating that a specific level of traffic loading was in existence prior to its application for additional two-way frequencies. Pocono's offer of testimony concerning the existence of two test mobile units on Station KNKD990 is an insufficient demonstration of existing two-way traffic to justify a request for additional channels.[13] As the Review Board correctly stated in its *Decision*, Pocono's " . . . attempt to predict substantial future system utilization from minimal past usage is . . . wholly speculative." *Decision*, 2 FCC Rcd at 7229. In addition, although Pocono submits 91 held orders for two-way service, we note that it appears from the trial record that they do not necessarily reflect businesses located within the proposed reliable service area, and therefore could not be fully credited to meet the required showing. *Id.* at n. 10. Moreover, held orders are insufficient in the absence of a traffic load study to support an application for additional channels. *See* Section 22.16 of the Rules.[14] In short, we agree with the Review Board's reasons for rejecting this argument.

19. We further find that Pocono's request for waiver of the traffic loading requirement for the Phillipsburg application was properly denied. In order to demonstrate that a waiver of Sections 22.16 and 22.516 of the Rules is justified, Pocono must show that the underlying purpose of the rules would not be served and that grant of the waiver is in the public interest, or that there are unusual and unique facts or circumstances which would render application of the rule unduly burdensome. *See* Section 22.19 of the Rules. The underlying purpose of requiring traffic load studies is to prevent the warehousing of channels by licensees. *See Procedures for Domestic Public Land Mobile Radio Service*, 53 Rad. Reg. 2d (P&F) 191, 193 (1983). Thus, in order to be granted additional channels, licensees have to demonstrate sufficient congestion in their existing system warranting additional channels. In this case, Pocono did not demonstrate sufficient congestion in its system warranting additional channels. Nor did it demonstrate any other need for additional channels. Therefore, Pocono did not demonstrate that the underlying purpose of the rule would be frustrated by its application in this case. On the contrary, in this particular case denial of the waiver promotes the underlying purpose of the rule. *See WAIT Radio v. FCC*, 418 F 2d. 1153 (D.C. Cir.1969). Second, there are no unique or unusual circumstances in this situation. We are unpersuaded that there are no reasonable alternatives to this application. The proposed Phillipsburg facility is not mutually exclusive with those of Digital's, and therefore, Pocono can reapply for an additional facility at the Phillipsburg location on frequency 454.075 MHz if it reduces the contour of the new channel so that it does not overlap Pocono's existing Station KNKD990 by more than 50%, or Pocono may apply for a co-channel facility with the same proposed contours on frequency 454.550 MHz. *See supra* at note 2. Accordingly, we find that a waiver of Sections 22.516 and 22.16 of the Rules has not been justified.

IV. CONCLUSION

20. Pocono's application for review and petitions for reconsideration do not demonstrate any errors in the analysis of the facts or of the authority which supported the MSD's actions. The dismissal of Pocono's applications and grant of Digital's applications fully complied with Commission rules and our policies regarding two-way mobile services. The application and petition restate most of the allegations previously considered and rejected by the MSD. We find that the arguments raised by Pocono do not warrant a waiver of Sections 22.516 and 22.16 of the Rules and grant of its Phillipsburg application, or a reversal of the MSD actions dismissing Pocono's Salisbury and Ironton applications and granting Digital's applications.

V. ORDERING PARAGRAPHS

21. ACCORDINGLY, IT IS HEREBY ORDERED, that the Application for Review of the grant of the application of Digital Paging Systems, Inc., File No. 21685-CD-P/L-1-85, filed by Pocono Mobile Radio Telephone Company, Inc. IS DENIED.

22. IT IS FURTHER ORDERED, that Pocono's request for Reconsideration of the grant of Digital's application, File No. 22918-CD-P/L-1-85, IS DENIED.

23. IT IS FURTHER ORDERED, that Pocono's request for Reconsideration of the dismissal of its application, File No. 23038-CD-P/ML-3-85, IS DENIED.

FEDERAL COMMISSION COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Pocono filed the petition for reconsideration of the MSD's grant of Digital's application for the Pottstown facility on April 11, 1988, and filed the petition for reconsideration of the MSD's dismissal of Pocono's application on April 25, 1988. The Bureau referred these petitions to the Commission pursuant to 47 C.F.R. §1.106(a)(1) along with the application for review in order to expedite a final determination of the entire controversy surrounding the captioned applications.

[2] Pocono's application for Phillipsburg was not in fact mutually exclusive with Digital's applications. However, Pocono's Phillisburg application was consolidated with its Salisbury and Ironton applications pursuant to our policy to license facilities, filed for the same frequency and located within forty miles of each other, under one call sign.

[3] The standard PLMS comparative issues are:

> (a) to determine, on a comparative basis, the nature and extent of service proposed by each applicant, including the rates, charges, maintenance, personnel, practices, classifications, regulations, and facilities pertaining thereto;
>
> (b) to determine on a comparative basis, the area and populations that each applicant will serve within the prospective interference-free area within 39 dBu contours based on the Commission's Rules and to determine and compare the relative demand for the proposed services in said areas; and
>
> (c) to determine, in light of the evidence adduced pursuant to the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.

[4] Section 22.516(a)(2) of the Rules, 47 C.F.R. §22.516(a)(2), requires the submission of a traffic loading study whenever an applicant requests an additional frequency for an existing two-way station. Section 22.16(b)(2), 47 C.F.R. §22.16(b)(2), specifies that an application is treated as an application requesting an additional frequency if 50% or more of the proposed reliable service area contour overlaps an existing contour.

[5] Pocono did not request a waiver of the traffic loading requirements for its proposed facilities at Ironton and Salisbury Township.

[6] Digital also filed a minor amendment to its application on April 26, 1988, relocating the antenna site for the Bethlehem facility.

[7] Digital's application for the Pottstown facility was granted by Public *Notice*, Report No. 88-24-A (released March 9, 1988), and Pocono's applications were dimissed by *Public Notice*, Report No. PMS 88-26A (released March 23, 1988).

[8] In addition, Pocono argues, since Digital's Pottstown application is for all practical purposes a one-way application, Digital's application must be dismissed as defective for failure to provide a traffic loading study. Digital, Pocono argues, was required to file a traffic loading study for the application because Digital's parent company had a pending one-way application in the same geographic area. The application referenced by Pocono filed by Digital's parent company has been dismissed. *Public Notice*, Report No. PMS 88-28-A (released April 6, 1988). Accordingly, we will give no further consideration to Pocono on this point since its argument is now moot. Assuming *arguendo* that the one-way application had not been dismissed, Pocono's argument is meritless since Digital's Pottstown application is for a two-way facility and not for a one-way facility. *See infra* at para. 13.

[9] We reject Digital's argument that Pocono lacks standing to challenge the grant of Digital's Pottstown application as Pocono is a party to this proceeding. As discussed in para. 3, *supra*, the Pottstown application had been placed on public notice as mutually exclusive with Pocono's application. A party has standing to file a petition for reconsideration of any action taken by a designated authority if the party is adversely affected by the action or is a party to the proceeding. *See* Section 1.106(b)(1) of the Rules.

[10] Pocono specifically points out in its application for review that Digital's proposed system will cause harmful interference to its system along Digital's 0 degree radial. Upon examination of the map that Pocono has submitted, we find that Digital's 0 degree radial crosses Pocono's service contour along the 246 degree radial. From Pocono's station file for its Stroudsburg facility, we find that for the 246 degree radial the height above average terrain is 702 feet and the effective radiated power is 30.9 watts. Along Digital's 0 degree radial, the height above average terrain is 433 feet and the effective radiated power is 1.35 watts. The calculated value of Tu is 0.2 making the ratio of desired to undesired signal 25.8 dB. The distance from Digital's proposed station to Pocono's reliable service contour is 18.1 miles. From these values, the MSD has determined that the 25.8 dB ratio has been met.

[11] It bears noting that in *Flexible Allocation of Frequencies in the Domestic Public Land Mobile Service*, 4 FCC Rcd 1576 (1989), we amended our rules to permit licensees of two-way common carrier channels to offer any type of mobile two-way or one-way service. Under the amended rules, an applicant for conventional two-way mobile frequencies will no longer be required to demonstrate that it is capable of offering two-way service upon demand.

[12] Half duplex mode is a method of operating a radio system whereby communications can be made in both directions but not in both directions simultaneously.

[13] Thus, it appears clear from the record in this proceeding that it would be impossible for Pocono to submit a traffic loading study that would justify a grant of an additional channel for its Station KNKD990. *ID*, 2 FCC Rcd at 2196, 2197; *Order*, 2 FCC Rcd at 5321 n.1.

[14] Pocono's assertion that the MSD should have allowed an amendment of its applications to include the requisite traffic loading study is equally without merit. Pocono has been on notice throughout this proceeding that it needed a traffic loading study; thus the Division should not have had to request it. The Division is similarly justified in assuming that if Pocono could have provided an adequate loading study, it would have done so during the two years that this proceeding was back before the Bureau. Yet it has never attempted to do so.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. CSS-87-006-LA

Application for authority to participate in the launch of the INTELSAT VI (F-3)

ORDER AND AUTHORIZATION

Adopted: March 13, 1990; Released: March 19, 1990

By the Chief, International Facilities Division:

1. The Commission has under consideration application, File Number CSS-87-006-LA, filed by the Communications Satellite Corporation (Comsat) on March 31, 1987, and updated on March 5, 1990, for authority to participate in the launch, positioning and in-orbit testing of the modified INTELSAT VI (F-3) satellite.

2. The application was placed on the Commission's Public Notice on April 8, 1987. No comments were received.

3. The INTELSAT VI (F-3) was delivered from the manufacturer's facility by land transport and arrived at the launch site in Florida in early November 1989, and is scheduled to be launched on March 14, 1990, utilizing a Titan III commercial launch vehicle. This satellite will replace the INTELSAT V-A (F-11) at 332.5 degrees East Longitude and will serve the Atlantic Ocean Region (AOR) Spare role. The INTELSAT V-A (F-11) will be moved to 325.5 degrees East Longitude and serve the AOR Major Path 1 role. It is anticipated that the INTELSAT VI (F-3) will be in service by approximately June 1, 1990.

4. The estimated costs associated with the INTELSAT VI (F-3) are as follows (all amounts in real year dollars):

HAC Contract (including delivery price, engineering charges and amendments and launch support)	$129,168,000
Performance incentives, capitalized	$ 10,770,000
Performance incentives, expensed	$ 15,488,000
Martin Marietta Launch Vehicle and services	$121,376,000
TOTAL INTELSAT	$276,802,000
TOTAL COMSAT (based on 1989-1990 ownership share of 26.913162 %)	$ 74,496,171

5. In view of the foregoing and the need to provide the necessary satellite facilities to meet traffic requirements, we conclude that the public interest would be served by a grant of the subject request. Accordingly, Comsat is AUTHORIZED to participate in the launch and test program of the INTELSAT VI (F-3) satellite to be positioned at 332.5 degrees East Longitude over the AOR, subject to the following terms and conditions:

(a) This authorization is limited to the described program. Any change in the authorized location due to a launch delay or other circumstances will be considered upon a proper request by Comsat for authority;

(b) Comsat shall furnish via the INTELSAT VI (F-3) only those channels of communication for commercial service which have been, or may be, authorized by the Commission under Section 214 of the Communications Act of 1934, as amended;

(c) Within 30 days after completion of the testing program, Comsat shall provide the Commission with a summary report of its results and upon request, shall make the detailed test data available;

(d) Conduct of the program authorized here shall be without interruption of commercial satellite service now authorized at U.S. earth stations;

(e) Neither this authorization nor any right granted herein shall be assigned or otherwise transferred without approval of the Commission; and

(f) Unless extended or modified for good cause, this authorization shall terminate six months after the release date of this order.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT
COMMUNICATIONS COMPANY,
Complainant,

v.

THE BELL TELEPHONE CO. OF PENNSYLVANIA,	File No. E-89-111
THE CHESAPEAKE & POTOMAC TELEPHONE CO.,	File No. E-89-112
THE DIAMOND STATE TELEPHONE CO.,	File No. E-89-113
NEW JERSEY BELL TELEPHONE CO.,	File No. E-89-114
ILLINOIS BELL TELEPHONE CO.,	File No. E-89-115
INDIANA BELL TELEPHONE CO., INC.	File No. E-89-116
MICHIGAN BELL TELEPHONE CO.,	File No. E-89-117
THE OHIO BELL TELEPHONE CO.,	File No. E-89-118
WISCONSIN BELL, INC.,	File No. E-89-119
NEVADA BELL,	File No. E-89-120
PACIFIC BELL,	File No. E-89-121
NEW ENGLAND TELEPHONE & TELEGRAPH CO.,	File No. E-89-122
NEW YORK TELEPHONE CO.,	File No. E-89-123
SOUTH CENTRAL BELL TELEPHONE CO.,	File No. E-89-124
SOUTHERN BELL TELEPHONE & TELEGRAPH CO.,	File No. E-89-125
SOUTHWESTERN BELL TELEPHONE CO.,	File No. E-89-127

Defendants.

ORDER

Adopted: March 13, 1990; Released: March 19, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On February 27, 1989, US Sprint Communications Company Limited Partnership (US Sprint) filed a formal complaint against the above-captioned local exchange carriers (defendants)[1] regarding their refusal to provide a service feature known as CARE Code 02.[2] It alleged that defendants' refusal to implement its request for such service violated their duty under Section 201(a) of the Communications Act to furnish interstate communication service upon reasonable request and was also an unreasonable practice in violation of Section 201(b) of the Act.

2. On March 7, 1990, US Sprint advised that, in view of internal measures it has developed to block nonpaying customers, and in the interest of conserving its resources and those of the Commission, it had decided to withdraw its complaint.[3]

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in 47 C.F.R. § 0.291, that the complaint filed by US Sprint Communications Company on February 27, 1989 IS DISMISSED and these proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] The complaint was also directed against Southern New England Telephone Company but withdrawn with respect to that company when it advised US Sprint that it would provide the service in question under terms that were satisfactory to US Sprint. US Sprint Communications Co. v. SNET, 4 FCC Rcd 3568 (Enf. Div. 1989).

[2] US Sprint wanted to use CARE Code 02 to block access to its network by terminating the presubscription of an end user to its interexchange service when the end user failed to pay for services rendered or otherwise violated the terms of US Sprint's common carrier offering. *Id.* at n.1.

[3] Letter from H. Richard Juhnke to Donna R. Searcy (Mar. 7, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 88-550

In the Matter of

Amendment of Parts 2 and 80 of the Commission's Rules to Accommodate Next Generation Weather Radars in the 2900-3000 MHz Band

ERRATUM

Released: March 19, 1990

On February 13, 1990, the Commission released a *Report and Order* (FCC 90-39) in GEN Docket No. 88-550. Due to typographical mistakes and inconsistencies with an earlier decision in GEN Docket No. 89-103, the *Report and Order* contained errors in the Rule Changes section. The following edits are being made to correct these errors. International footnotes numbers 772, 774, and 775 in columns 4 and 5, for the frequency band 2900-3100 MHz, in the Table of Frequency Allocations are being deleted and are replaced by International footnote 775A in accordance with recently adopted changes to the Table that resulted from the 1987 World Administrative Conference on the Mobile Services. (*See* GEN Docket No. 89-103, 54 FR 49979, December 4, 1989). In addition, in column 4 the words "METEOROLOGICAL AIDS" are deleted. Further, new footnote US309, listed in columns 4 and 5 and whose text appears in the list of footnotes at the end of the table is incorrectly numbered. The correct number should be US316. Finally, Government footnote G56, which was inadvertently omitted, is be added to column 4 of the table.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

RULE CHANGES

11. Parts 2 and 80 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended by listing footnote US316 in columns 4 and 5 for the 2900-3100 MHz band and by adding the text of footnote US316 to the list of footnotes at the end of the table as follows:

Section 2.106 *Table of Frequency Allocations*

United States table

Government Allocation (MHz) (4)	Non-Government Allocation (MHz) (5)
* * * * * *	
2900-3100	2900-3100
MARITIME RADIONAVIGATION	MARITIME RADIONAVIGATION
775A	775A
Radiolocation US44 US316 G56	Radiolocation US44 US316
* * * * * *	

* * * * *

United States (US) Footnotes

* * * * *

US316 The band 2900-3000 MHz is also allocated on a primary basis to the Meteorological Aids Service. Operations in this service are limited to Government Next Generation Weather Radar (NEXRAD) systems where accommodation in the 2700-2900 MHz band is not technically practical and are subject to coordination with existing authorized stations.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-518

In the Matter of

Amendment of Section 73.606(b), RM-6123
Table of Allotments,
TV Broadcast Stations.
(Yreka City, California;
Medford, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 6, 1990; Released: March 20, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Further Notice* in this proceeding, 4 FCC Rcd 6340 (1989), proposing the substitution of UHF television Channel 26 for Channel 27 at Medford, Oregon, in response to a revised proposal filed by Junko and Bobby C. Shehan ("petitioners").[1] Petitioners submitted late-filed comments in support of the proposal.[2]

2. In consideration of the above, and in the absence of any objections to the petitioners' modified proposal, we believe the public interest would be served by substituting UHF television Channel 26 for Channel 27 at Medford, as requested.

3. As a result of our determination, the petitioners may amend their application (BPCT-871002KI) at Medford to specify the new frequency without losing their protected status since the proposed substitution of Channel 26 is mutually exclusive with existing Channel 27. As indicated in the *Further Notice*, Channel 26 can be substituted for Channel 27 at Medford at the petitioner's application site.[3]

4. Although the Commission has imposed a freeze on television allotments or applications therefor in certain metropolitan area, Medford is not in one of the affected areas. *See Order*, 52 FR 28346 (July 29, 1987).

5. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 4, 1990**, the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED with regard to the community listed below, as follows:

City	Channel No.
Medford, Oregon	5,*8+,10+,12+,26+

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioners originally requested the substitution of UHF television Channel *35 for vacant Channel *20 at Yreka City, California, to permit the use of a preferred transmitter site for Channel 27 at Medford, for which they are the sole applicants (BPCT-871002KI). Petitioners subsequently withdrew that request, proposing instead the substitution of Channel 26 for Channel 27 at Medford.

[2] Petitioners' comments were not accompanied by a motion to accept. However, since they are the only applicant for Channel 27 at Medford, and their comments merely express a continuing interest in the proposal, no harm will result from their acceptance.

[3] Coordinates specified in the petitioners' application (BPCT-871002KI) for Channel 27 at Medford are 42-17-54 and 122-44-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-195

In the Matter of

Amendment of Section 73.202(b), RM-7152
Table of Allotments,
FM Broadcast Stations.
(Brookline, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 5, 1990; Released: March 20, 1990

By the Chief, Allocations Branch:

1. The Commission has before it a petition for rule making filed by Laurie L. Ankarlo (petitioner), requesting the allotment of FM Channel 271A to Brookline, Missouri, as that community's first FM broadcast service. Petitioner submitted information in support of the proposal and stated her intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration. Channel 271A can be allotted to Brookline, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restiction provided a channel substitution is made at Springfield, Missouri.[1] Channel 271A is short spaced to Channel 268C, Station KTXR, Springfield, Missouri. Station KTXR was ordered to Channel 267C in MM Docket 86-103. *See* 4 FCC Rcd 5645 (1989). Since the allotment at Brookline is contingent on the station at Springfield being licensed on the new channel, final action in this proceeding may be delayed until the license grant occurs.

3. In view of the fact that the proposed allotment could provide a first FM broadcast service to Brookline, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Brookline, Missouri	------	271A

4. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following:

Stereo Broadcasting, Inc.
3000 E. Chestnut Expressway
Springfield, Missouri 65808
(licensee of Station KTXR)

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 11, 1990,** and reply comments on or before **May 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Laurie L. Ankarlo
2343 S. Terrace Dr.
Springfield, Missouri 65804

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 271A are 37-09-48 and 93-25-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-131

In the Matter of

Amendment of Section 73.202(b), RM-7162
Table of Allotments,
FM Broadcast Stations.
(Bowling Green, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 6, 1990; Released: March 20, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Pike County Broadcasting Co., Inc. (petitioner), requesting the substitution of FM Channel 231C3 for Channel 231A at Bowling Green, Missouri.[1] Petitioner also requests modification of its license for Station KPCR-FM to specify Channel 231C3 in lieu of Channel 231A. Petitioner provided an engineering study in support of the proposal and indicated its intention to file an application for Channel 231C3.

2. We believe petitioner's proposal warrants consideration. Channel 231C3 can be allotted to Bowling Green, Missouri, in compliance with the Commission's spacing requirements at the petitioner's specified site.[2] We shall propose to modify the license held by Pike County Broadcasting Co., Inc., for Station KPCR-FM, Bowling Green, to specify operation on Channel 231C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide a wide coverage area station for Bowling Green, Missouri, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Bowling Green, Missouri	231A	231C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 11, 1990,** and reply comments on or before **May 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

J. Paul Salois, President
Pike County Broadcasting Co., Inc.
P.O. Box 1, Hwy 54 East
Bowling Green, Missouri 63334

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Station KPCR-FM was ordered from Channel 265A to Channel 231A in MM Docket 86-103 effective September 5, 1989. *See* 4 FCC Rcd 5645 (1989).

[2] The coordinates for Channel 231C3 are 39-21-57 and 91-10-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-130

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Rockledge, Florida) — RM-7160

NOTICE OF PROPOSED RULE MAKING

Adopted: March 6, 1990; Released: March 20, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by D.V.R. Broadcasting (petitioner), permittee of Channel 274A at Rockledge, Florida. Petitioner requests the substitution of Channel 274C2 for Channel 274A at Rockledge and modification of its construction permit (BPH-861105NK) to specify operation on the higher class channel.

2. We believe the public interest would be served by proposing the substitution of Channel 274C2 for Channel 274A at Rockledge, Florida. Channel 274C2 can be allotted to Rockledge in compliance with the Commission's minimum distance separation requirements, with a site restriction of 24.2 kilometers (15.0 miles) north of the city.[1]

3. As requested, we shall also propose to modify petitioner's construction permit to specify operation on Channel 274C2. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of Channel 274C2 at Rockledge or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested persons.

4. In view of the fact that Rockledge could receive a wide coverage area FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Rockledge, Florida	274A	274C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 11, 1990,** and reply comments on or before **May 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Peter Gutmann
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(Attorney for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are North Latitude 28-33-30 and West Longitude 80-48-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-131

In the Matter of

Amendment of Section 73.202(b), RM-6702
Table of Allotments,
FM Broadcast Stations.
(Grand Coulee, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 6, 1990; Released: March 20, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of Wheeler Broadcasting, Inc. (petitioner),[1] licensee of Station KEYG-FM, Channel 253C2 at Grand Coulee, Washington, the Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 4842 (1989), proposing the substitution of Channel 253C for Channel 253C2. The *Notice* also proposed the modification of Station KEYG-FM's license to specify operation on the higher class co-channel. Petitioner filed supporting comments reaffirming its interest in the upgrade.

2. We believe the public interest would be served by substituting Channel 253C for Channel 253C2 at Grand Coulee, providing the community with enhanced FM broadcast service. Channel 253C can be allotted to Grand Coulee in compliance with the Commission's minimum distance separation requirements at the site specified by the petitioner at coordinates 47-52-48 and 118-58-20. Concurrence has been obtained from the Canadian government since the proposal is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station KEYG-FM to specify operation on Channel 253C.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 4, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Grand Coulee, Washington	253C

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Wheeler Broadcasting, Inc., for Station KEYG-FM, Grand Coulee, Washington, IS MODIFIED, to specify operation on Channel 253C in lieu of Channel 253C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] In the *Notice* we erroneously identified the petitioner as Pioneer Broadcasting, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-129

In the Matter of

Amendment of Section 73.202(b),	RM-7084
Table of Allotments,	RM-7290
FM Broadcast Stations.	
(Dothan, Alabama, Graceville,	
Santa Rosa Beach and Springfield,	
Florida)	

NOTICE OF PROPOSED RULE MAKING
SHOW CAUSE ORDER

Adopted: March 6, 1990; Released: March 20, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration are two interrelated petitions for rule making. They both require the substitution of Channel 269A for Channel 271A at Graceville, Florida. The first petition, filed by Emerald Coast Communications, Inc. ("Emerald"), licensee of Station WWAV(FM), Channel 272A, Santa Rosa Beach, Florida, proposes the substitution of Channel 271C3 for Channel 272A at Santa Rosa Beach, and the modification of its license to specify the higher class channel. In order to accomplish the upgrade at Santa Rosa Beach the petitioner suggests the substitution of Channel 269A for vacant but applied for Channel 271A at Graceville, Florida, for which two applications are now pending.[1] Petitioner also suggests the substitution of Channel 267A for Channel 270A at Springfield, Florida, and the modification of the construction permit of Station WYOO(FM) at Springfield, Florida, to specify operation on Channel 267A. The second petition, filed by Broadcast Associates, Inc. ("BAI"), permittee of Station WSEP(FM), Channel 273A at Dothan, Alabama, seeks the substitution of Channel 273C3 for Channel 273A at Dothan, and modification of the construction permit for Station WESP to specify Channel 273C3. The upgrade at Dothan also requires the substitution of Channel 269A for Channel 271A at Graceville, Florida. Emerald and BAI each state their willingness to apply for the requested channel, if allotted.

2. Channel 271C3 can be substituted for Channel 272A at Santa Rosa Beach in compliance with the Commission's minimum distance separation requirements with a site restriction 11.7 kilometers (7.3 miles) west,[2] if the channel changes are made at Graceville and Springfield. Channel 273C3 can be substituted for Channel 273A at Dothan, Alabama, in compliance with the Commission's minimum distance separation requirements with a site restriction 5.9 kilometers (3.7 miles) east in order to avoid a short-spacing to Station WAMI(FM), Channel 272A, Opp, Alabama,[3] if the channel change is made at Graceville. Channel 269A can be substituted for Channel 271A at Graceville in compliance with the Commission's minimum distance separation requirements with a site restriction 5.3 kilometers (3.3 miles) south.[4] Channel 267A can be substituted for Channel 270A at Springfield at the site specified in the construction permit for Station WYOO(FM).[5] Accordingly, we are issuing a *Show Cause Order* to Randall R. Wahlberg, the permittee of Station WYOO(FM) at Springfield, Florida, seeking comments as to why his permit should not be modified to specify operation on Channel 267A in lieu of Channel 270A.

3. In accordance with Commission policy, we shall propose to substitute Channel 271C3 for Channel 272A at Santa Rosa Beach, Florida, and modify the license for Station WWAV(FM) to specify operation on Channel 271C3 and propose the substitution Channel 273C3 for Channel 273A at Dothan, Alabama, and modify its construction permit to specify Channel 273C3. We shall also propose to substitute Channel 269A for Channel 271A at Graceville, Florida, and substitute Channel 267A for Channel 270A, and modify the construction permit for Station WYOO(FM) at Springfield, Florida.

4. Commission policy requires that the Emerald reimburse Station WYOO(FM) for the reasonable costs of changing its frequency. Petitioner states its willingness to reimburse Station WYOO(FM). The applicants for Channel 271A at Graceville will be permitted to amend their applications to specify Channel 269A, if allotted, and retain cut-off protection, since no upgrade in the class of channel is proposed.

5. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Dothan, Alabama	238C, 259C1 267A, 273A	238C, 259C1 267A, 273C3
Santa Rosa Beach, Florida	272A	271C3
Graceville, Florida	271A	269A
Springfield, Florida	240A, 270A	240A, 267A

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Randall R. Wahlberg, permittee of Station WYOO(FM), Channel 270A, Springfield, Florida, SHALL SHOW CAUSE why his construction permit should not be modified to specify operation on Channel 267A in lieu of Channel 270A.

7. Pursuant to Section 1.87 of the Commission's Rules, Randall R. Wahlberg, may, not later than **May 11, 1990,** file a written statement showing with particularity why its permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Randall M. Wahlberg, to furnish additional information. If Randall R. Wahlberg, raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Randall R. Wahlberg, will be deemed to have consented to the modi-

fication as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Randall R. Wahlberg
4324 West 20th Street, E-232
Panama City, FL 32405

9. IT IS ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 271A at Graceville, Florida, as follows:

Graceville Panhandle Broadcasting, Inc.
520 Seaport Road
Pace, FL 32571

Lina M. Parish
P.O. Box 345
Graceville, FL 32440

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **May 11, 1990,** and reply comments on or before **May 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Richard J. Bodorff Wiley, Rein & Fielding 1776 K Street, N.W. Washington, D.C. 20036 (Counsel for Emerald Coast Communications, Inc.)	Stephen G. McGowan, President Broadcast Associates, Inc. P.O. Box 5707 Dothan, Alabama 36302

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Applications on file for Channel 271A at Graceville, Florida, are by Lina M. Parish (BPH-880505MB) and Graceville Panhandle Broadcasting, Ltd. (BPH-880505NP).

[2] The coordinates for Channel 271C3 at Santa Rosa Beach are North Latitude 30-22-31 and West Longitude 86-21-00.

[3] The coordinates for Channel 273C3 at Dothan, Alabama, are North Latitude 31-14-40 and West Longitude 85-20-10.

[4] The coordinates are North Latitude 30-55-00 and West Longitude 85-29-54.

[5] The coordinates are North Latitude 30-12-30 and West Longitude 85-33-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-83

In re Applications of

WILLIAM E. KUIPER, JR. (hereafter "Kuiper")	File No. BPH-880125MA
GNS BROADCASTING (hereafter "GNS")	File No. BPH-880126MH
BROADCAST HOUSE INCORPORATED (hereafter "Broadcast")	File No. BPH-880126MN
MW MULTICOM, INC. (hereafter "Multicom")	File No. BPH-880126MU
BETTY JEAN GOULOOZE AND JOHN ROBERT MCCLURE, JR. d/b/a WALKER BROADCASTING CO.	File No. BPH-880126NE

For Construction Permit
for a New FM Station on
Channel 263A in Walker, Michigan

HEARING DESIGNATION ORDER

Adopted: February 16, 1990; Released: March 20, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. It should be noted that due to the late tenderability period opened on June 6, 1989 by applicant Kuiper, various amendments filed by the competing applicants, which otherwise would have been late-filed, will be considered filed as of right, and therefore will be afforded full comparative advantage. *See Memorandum Opinion and Order*, reconsideration in Docket 84-750, 50 Fed. Reg. 43157 (1985). Amendments filed after this period will be addressed below.

3. *Tower Height Discrepancy*. Both Kuiper and Walker propose to collocate their antennae on an existing tower located near Walker, Michigan. The tower data submitted in Section V-G of FCC Form 301 in both Kuiper's and Walker's applications, however, are inconsistent with that contained in the Commission's records. In Section V-B of FCC Form 301, Kuiper lists the overall height above ground level (AGL) of the tower as 115.5 meters and the overall height above mean sea level (AMSL) as 350.2 meters. Walker lists the overall height AGL as 111 meters and overall height AMSL as 346 meters. GNS also proposes to collocate its antenna on this same tower, but GNS lists the tower heights on file in the Commission's records: an overall height AGL of 109.7 meters and overall height AMSL of 344.4 meters. Because Kuiper, Walker and GNS proposes to locate on an existing tower utilized by an existing Commission licensee, the staff could confidently and reliably verify the pertinent tower height by taking official notice of the tower parameters found in the Commission's records for the licensed facilities. However, because of the discrepancy, Kuiper, Walker and GNS will be required to file an amendment with the presiding Administrative Law Judge, within 30 days of the release of this Order, correcting or verifying the tower heights listed in their respective proposals.

4. Kuiper is an officer and director of Furniture City Broadcasting Corporation, licensee of station WFUR-FM, Grand Rapids, Michigan. Kuiper has indicated his intent to terminate his relationship with stations WFUR-FM, in the event of grant of this application. WFUR-FM is close enough to Walker, Michigan that co-ownership will cause a violation of the Commission's multiple ownership rules, 47 C.F.R. § 73.3555(a). Accordingly, in the event of grant of his application, Kuiper will be required to sever all connections with WFUR-FM prior to the commencement of program test authority.

5. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Broadcast	August 21, 1989
Multicom	July 27, 1989

6. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Kuiper have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Kuiper would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the Kuiper would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That Kuiper, Walker and GNS shall submit the amendments in accordance with paragraph 3 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That, in the event of grant of Kuiper's application, Kuiper will be ordered to divest himself of all interests in and sever all connections with Stations WFUR-FM, Grand Rapids, Michigan, prior to the commencement of program test authority.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Broadcast and Multicom ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SATELLITE CELLULAR SYSTEMS — File No. 10108-CL-P-674-A-88

For authority to construct and operate a Domestic Public Cellular Radio Telecommunications Service on frequency Block A in RSA Market 674, Utah
#2 - Morgan

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 1990; Released: March 20, 1990

By the Commission: Commissioner Duggan not participating.

I. BACKGROUND

1. Satellite Cellular Systems (Satellite) has filed an Application for Review of a Common Carrier Bureau order denying reconsideration of a Mobile Services Division (MSD) order which dismissed its application as defective. Satellite was the applicant randomly selected for the Utah 2 - Morgan Rural Service Area (RSA) cellular license. Subsequently, the MSD dismissed Satellite's captioned application because in processing the application after the lottery, the MSD found that the correct microfiche copies of its application were not included with its transmittal sheet.[1] Instead, the microfiche copies of Signal Cellular Communication's application were filed with Satellite's transmittal sheet.[2]

2. Satellite filed a Petition for Reconsideration of the MSD's decision. In its Petition, Satellite argued that its application should be accepted for filing because its application was correct when filed with the Commission. It argued that its application preparer, The Cellular Corporation (TCC), "designed and implemented a specific system for application preparation and filing to ensure that no applicant would incur the problem that Satellite now faces." (Petition at 2.) Satellite described the steps undertaken to prepare its application and provided affidavits from the individuals responsible for each step of the procedure. Through this explanation of its procedures, Satellite argued that it established a "factual chain" demonstrating that its application was correctly filed. Satellite further argued that in any event, the defect is minor, and the Commission should permit it to cure the defect.

3. In *Satellite Cellular Systems*, 4 FCC Rcd 4477 (Com. Car. Bur. 1989) (hereinafter the "May *Order* "), the Chief, Common Carrier Bureau (Bureau) denied Satellite's Petition and upheld the Mobile Services Division's dismissal of Satellite's application. The May *Order* held that an applicant for a cellular license in a Rural Service Area (RSA) is required, pursuant to Section 22.923(b)(5) of the Commission's Rules, to file two microfiche copies of its application with a transmittal sheet as part of its initial filing. The Bureau found that the "letter perfect" rule applied to the required microfiche copies, and since Satellite had not filed the correct microfiche copies of its application with the transmittal sheet, its application was unacceptable for filing. The Bureau stated that an application which is not acceptable for filing may not be amended. *Jacksonville Cellular Telephone Company*, 3 FCC Rcd 5386 (1988).

4. In addition, the Bureau found that Satellite had offered no support or precedent for the proposition that affidavits describing the application preparation process show a "factual chain of events" proving that the application was filed correctly. Accordingly, the May *Order* concluded that Satellite's application was filed in a defective condition, and that the MSD had correctly dismissed the application.

II. SATELLITE'S CONTENTIONS

5. In its Application for Review, Satellite argues that the Bureau erroneously applied the letter-perfect standard of review to Satellite's application after it had won the lottery. Satellite argues that "the letter perfect standard applies only to initial intake of cellular applications and is inapplicable to post-lottery review of lottery winners," citing *Johnstown Cellular Communications Co.*, 1 FCC Rcd 1164 (Com. Car. Bur. 1986). Satellite argues that the staff's action dismissing its application took place in the post-lottery stage, and that the Bureau committed a "clear error" because it applied the letter-perfect standard to its application. Satellite further argues that the Bureau's reliance on *Johnstown*, *Jacksonville*, and *Pactel Mobile Access*, 1 FCC Rcd 564 (1986), which were decided under the letter perfect standard, is misplaced.

6. Satellite further argues that *PacTel Cellular*, 4 FCC Rcd 4561 (Com. Car. Bur. 1989) (*PacTel*), and *Fred Farley*, 4 FCC Rcd 4670 (Com. Car. Bur. 1989) (*Farley*), establish the post-lottery standard of review which it argues the Bureau should have applied to its application. In *PacTel*, the RSA applicant submitted the paper copies of its application two days late, in violation of Section 22.923(b)(2),[3] because it had not received a timely copy of the public notice announcing its selection in the lottery. In *Farley*, the applicant submitted the paper copies of an application for a market other than the one in which it won the lottery. The applicant recognized its error and filed the correct copies within a few days. In both cases, the applicants requested that the Bureau waive Section 22.923(b)(2) and accept their paper application. The Bureau found, in each case, that a grant of the waiver request would further the policy expressed by the rule. In finding that a waiver was justified, the Bureau considered the efforts taken by the applicant to comply with the rules, the applicant's attempts to correct the defect upon discovery, and the applicant's compliance with pre-lottery filing procedures. Satellite argues that the "flexible approach" that the Bureau used in *PacTel* and *Farley* should apply to its situation, rather than the letter perfect rule applied by the May *Order*.

7. Thus, Satellite argues that under the rule of *Farley* and *PacTel*, the Bureau committed "clear error" because it did not take into account the efforts Satellite took to comply with the Commission's rules. Without explicitly admitting it erred in filing its application, Satellite argues

that the fact that its transmittal sheet and microfiche copies were disassociated and that this fact was not discovered until after the lottery was held should result in treatment of the disassociation as a minor clerical error, correctable under the post-lottery standard of review.

III. DISCUSSION

8. We have previously held that:

> . . . [O]ur "letter perfect" standard applies to specific pre-lottery filing requirements: *i.e.*, each applicant for cellular markets 121 and beyond [is] required to certify to the completeness of its application, submit an original application and paper duplicate, the cover of which [has] to include the applicant's name and the market name, market number and frequency block for which it [is] applying, and provide two microfiche copies of its application at the time of filing. . . .

Jacksonville, 3 FCC Rcd at 5386. Here, Satellite failed to file the correct microfiche copies of its application with its transmittal sheet. Satellite acknowledges that the "letter perfect" standard would result in dismissal of its application. However, Satellite raises the argument that since the staff did not dismiss its application until after the lottery was held, the Commission cannot now conclude that Satellite failed to comply with the pre-lottery filing requirements. Accordingly, the issue we address here is whether the "letter perfect" standard requires dismissal of Satellite's application even though the error in its application was discovered only after the lottery was held.

9. Section 22.26(b) of our rules provides that acceptance of an application for filing does "not preclude the subsequent return or dismissal of the application if it is found to be defective or not in accordance with the Commission's rules." Pursuant to this rule, the Bureau has often held in the past that even though an application defect of the kind included in the "letter perfect" standard is not discovered until after the lottery, the application is defective and will be dismissed.

10. For example, in *Central Illinois Cellular Limited Partnership*, 2 FCC Rcd 436 (Com. Car. Bur. 1987), the Common Carrier Bureau dismissed an application in which the applicant's name on the cover of the application and the applicant's name on the certification page were not the same. The Bureau said that even though the error was not detected at the processing stage, the application was defective under the letter perfect standard and therefore was unacceptable for filing. *Id.* at 437. In addition, in *Sun Communications, Inc.*, 4 FCC Rcd 6429 (Com. Car. Bur. 1989), the lottery winner's application was dismissed pursuant to the letter perfect rule at the petition for reconsideration stage. Review of the application during the staff's consideration of the petition revealed that a representative of Sun had not signed the certification statement on the transmittal sheet. Accordingly, the application was defective and could not be amended.

11. The Bureau's decisions in *Farley* and *PacTel*, cited by Satellite in support of its argument that more lenient post-lottery review standards should apply to its instant application, do not support Satellite's arguments. Indeed, they support the conclusion reached here. Both decisions specified that only certain aspects of an application are subject to the "letter perfect" standard, including information contained on the transmittal sheet and the microfiche copies of the application. Both decisions noted that none of the application criteria subject to the "letter-perfect" standard was in issue in those cases.

12. In conclusion, we find that Satellite's application was defective when filed because it failed to include two microfiche copies of its application with its transmittal sheet as required by Section 22.923(b)(5) of the Rules. The discovery of this defect after the lottery in no way changes the fact that Satellite's application is defective. Accordingly, the Bureau was correct in dismissing Satellite's application.

13. Accordingly, IT IS ORDERED that the Application for Review filed by Satellite Cellular Systems IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Applicants for an initial cellular license in the Rural Service Areas (RSAs) are required to submit two microfiche copies of their application accompanied by a transmittal sheet identifying *inter alia* the application by market name and number and the applicant's name. *See* Section 22.923 of the Rules, 47 C.F.R. Section 22.923. The original and two paper copies of the application are not filed until seven days after public notice is given that the applicant has won the lottery.

[2] The dismissal letter stated in pertinent part:

> The applicant's name on the envelope containing the microfiche copy of the application was that of Signal Cellular Communications, as was the name on both copies of the microfiche application, while the name on the transmittal sheet was for Satellite Cellular Systems.

Letter from Mobile Services Division, FCC to Betty Thompson, General Partner, Satellite Cellular Systems (December 8, 1988).

[3] Section 22.923(b)(2) states in pertinent part:

> Within seven (7) days of the release date of the public notice announcing the lottery results, the applicant selected first in the lottery shall submit the original and two hard copies of the application . . .

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-129

In the Matter of

Amendment of Section 73.202(b), RM-6675
Table of Allotments,
FM Broadcast Stations.
(Lake Geneva, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 22, 1990; Released: March 21, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of Southern Wisconsin Company, Inc. (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 4840 (1989), proposing the allotment of Channel 241A to Lake Geneva, Wisconsin, as that community's first local FM service. Petitioner filed supporting comments restating its intention to apply for the channel. Mianne Nelson, Lake Geneva Broadcasting Group and Kingsley H. Murphy, Jr. filed supporting comments in which they each also expressed an interest in applying for the new channel.

2. Channel 241A can be allotted to Lake Geneva in compliance with the Commission's minimum distance separation requirements[1] with a site restriction of 2 kilometers (1.2 miles) northwest of the city.[2] The site restriction is required in order to avoid short spacings to Station KLIO(FM), Channel 241C1 at Clinton, Iowa, and Station WBBM-FM, Channel 242B at Chicago, Illinois.

3. We believe the public interest would be served by allotting Channel 241A to Lake Geneva, Wisconsin, as that community's first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 14, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Lake Geneva, Wisconsin	241A

4. The window period for filing applications will open on **May 15, 1990,** and close on **June 14, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

[2] The coordinates are 42-36-50 and 88-26-51.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-137

In the Matter of

Amendment of Section 73.202(b),	RM-7095
Table of Allotments,	RM-7106
FM Broadcast Stations.	
(Morris and Pontiac, Illinois)	

NOTICE OF PROPOSED RULE MAKING

Adopted: March 7, 1990; Released: March 21, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration two separately filed petitions for rule making. The first petition, filed on behalf of Nelson Enterprises, Inc. ("Nelson"), seeks allotment of Channel 276A to Morris, Illinois, as a second local service. In order to accomplish the allotment at Morris, Nelson also requests substitution of Channel 229A for Channel 276A at Pontiac, Illinois. The second petition, filed by Livingston County Broadcasters, Inc. ("WJEZ"), licensee of Station WJEZ(FM), Pontiac, Illinois, requests the substitution of Channel 229A for Channel 276A at Pontiac, Illinois, and modification of the license for Station WJEZ to specify operation on Channel 229A.

2. In support of its proposal, WJEZ states that it will be limited in improvement of its facilities on its present frequency, and will be unable to take full advantage of the increased power and coverage afforded Class A FM stations under recent Commission rule changes.[1] However, by substituting Channel 229A for Channel 276A, WJEZ will be able to increase its power to 6 kW.

3. An engineering analysis has determined that the proposed allotment of Channel 276A can be made to Morris, Illinois, in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.2 kilometers (5.1 miles) southeast.[2] The proposed substitution of Channel 229A for Channel 276A at Pontiac, Illinois, can be achieved in compliance with the Commission's minimum distance separation requirements with a site restriction 2.2 kilometers (1.4 miles) east at Station WJEZ's currently licensed site. [3] As requested, we shall propose to modify the license for Station WJEZ(FM) to specify operation on Channel 229A.

4. We believe the public interest would be served by the proposed allotment of Channel 276A at Morris, Illinois, and the substitution of Channel 229A for Channel 276A at Pontiac, Illinois. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

City	Channel No. Present	Proposed
Morris, Illinois	--	276A
Pontiac, Illinois	276A	229A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 14, 1990,** and reply comments on or before **May 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Jerrold Miller
Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Attorney for Nelson Enterprises, Inc., and
Livingston County Broadcasters, Inc.)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See* MM Docket 88-375, 4 FCC Rcd 6375 (1989).

[2] The coordinates are North Latitude 41-18-39 and West Longitude 88-22-08.

[3] The coordinates are North Latitude 40-52-31 and West Longitude 88-36-11.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-139

In the Matter of

Amendment of Section 73.202(b), RM-7149
Table of Allotments,
FM Broadcast Stations.
(Oshkosh and Winneconne, Wisconsin;
and Menominee, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 5, 1990; Released: March 21, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed jointly by Value Radio Corp. ("Value"), the licensee of Station WMGV(FM), Channel 280A, Oshkosh, Wisconsin, and CJL Broadcasting, Inc. ("CJL"), the licensee of Station WCJL-FM, Channel 280A, Menominee, Michigan, seeking the upgrade of their respective radio broadcast stations. Value seeks the substitution of Channel 280C3 for Channel 280A at Oshkosh, Wisconsin, a change of community of license to Winneconne, Wisconsin, from Oshkosh, and the modification of the license of Station WMGV(FM) to specify operation on Channel 280C3 at Winneconne. CJL requests the substitution of Channel 279C3 for Channel 280A at Menominee, Michigan, and the modification of its license for Station WCJL-FM at Menominee to specify the higher powered channel accordingly. Value and CJL ("petitioners"), state that if the channels are allotted, as requested, they will apply for the channels. Petitioners submit information in support of their proposals to upgrade Stations WMGV(FM) and WCJL-FM while providing Winneconne with its first local transmission service.

2. Petitioners state that local broadcast service will continue to be provided to Oshkosh from Stations WOSH(AM), WLKE(AM), WAHC(FM) and WRST-FM. Petitioners further state that Winneconne is a "solid community with a population of approximately 2,000." Petitioners also state that the proposal to change the community of license for Station WMGV(FM) from Oshkosh to Winneconne is mutually exclusive with the station's present operation. In addition, petitioners express a willingness to relocate their current transmitter sites in order to accomplish the upgrades.

3. We believe the proposal warrants consideration. Oshkosh (population 49,620)[1] would retain local broadcast service from Stations WOSH(AM), WLKE(AM), WAHC(FM) and WRST-FM while Winneconne (population 1,935) could receive its first local service. The proposal is mutually exclusive with the present operation of Station WMGV(FM) because the separation between Oshkosh and Winneconne is less than the 142 kilometers (88.3 miles) required for Class C3 to Class A co-channel allotments. Therefore, in accordance with Section 1.420(i) of the Commission's Rules, we shall propose to modify the license of Station WMGV(FM) to specify Channel 280C3 at Winneconne in lieu of Channel 280A at Oshkosh, as requested.

4. Channel 280C3 can be allotted to Winneconne in compliance with the Commission's minimum distance separation requirements at the site specified by Value.[2] In addition, Channel 279C3 can be substituted for Channel 280A at Menominee consistent with the Commission's technical requirements at a restricted site 13 kilometers (8 miles) west of the city. [3] As requested, we shall also propose to modify the license of Station WCJL-FM to specify operation on Channel 279C3 in lieu of Channel 280A at Menominee. Accordingly, in accordance with Sections 1.420(g) and (i) of the Commission's Rules, we shall not accept competing expressions of interest in the use of Channel 279C3 at Menominee or 280C3 at Winneconne nor require the petitioners to demonstrate the availability of an additional equivalent class channel at Menominee and Winneconne.

5. Since Menominee is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence must be obtained from the Canadian government for the proposal.

6. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communites:

	Channel No.	
City	Present	Proposed
Oshkosh, Wisconsin	244A, 280A	244A[4]
Winneconne, Wisconsin	---	280C3
Menominee, Michigan	280A	279C3

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **May 14, 1990,** and reply comments on or before **May 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

David D. Oxenford, Esq.
Scott R. Flick, Esq.
Fisher, Wayland, Cooper and Leader
1255 Twenty-third Street, N.W.
Suite 800
Washington, D. C. 20037-1125
(Counsel for petitioners)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service*. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies*. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings*. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures taken from the 1980 U.S. Census.

[2] Value's specified site is located 16.2 kilometers (10 miles) northwest of Winneconne at coordinates 44-15-09 and 88-44-48.

[3] The coordinates for Channel 279C3 at Menominee are 45-06-21 and 87-46-43.

[4] There is a separate proceeding before the Commission to substitute Channel 245A for Channel 244A at Oshkosh. *See* MM Docket No. 89-282, 4 FCC Rcd 4904 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-140

In the Matter of

Amendment of Section 73.202(b), RM-7197
Table of Allotments,
FM Broadcast Stations.
(Pierre, South Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 5, 1990; Released: March 21, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Robert E. Ingstad (petitioner), requesting the substitution of Channel 224C1 for Channel 224A at Pierre, South Dakota, and the modification of his license for Station KGFX-FM to specify the higher powered channel. Channel 224C1 can be allotted to Pierre in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.6 kilometers (6.0 miles) northwest to avoid a short-spacing to the proposed allotment of Channel 224C3 at Ainsworth, Nebraska, MM Docket 89-144. *See* 4 FCC Rcd 4904 (1989).[1] Petitioner states that he will apply for the channel, if allotted.

2. As requested, we propose to modify petitioner's license for Station KGFX-FM to specify operation on Channel 224C1. In accordance with Section 1.420, we will not accept competing expressions of interest in use of the higher powered channel at Pierre, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. We believe the public interest would be served by proposing the substitution of Channel 224C1 for Channel 224A at Pierre, South Dakota, since it could enable Station KGFX-FM to expand its coverage area. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Pierre, South Dakota	224A, 237A	224C1, 237C2[2]

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 14, 1990,** and reply comments on or before **May 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Clifford M. Harrington, Esq.
Fisher, Wayland, Cooper and Leader
1255 23rd Street, N.W., Suite 800
Washington, D.C. 20037
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for this allotment are North Latitude 44-26-00 and West Longitude 100-26-00.

[2] The Commission, on its own motion, has proposed to upgrade Station KGFX to Channel 224C3 and Station KLXS to Channel 237C3. *See*, MM Dockets 89-153 and 89-181, respectively, 4 FCC Rcd 4904 (1989). Sorensen Broadcasting has filed a counterproposal in MM Docket 89-181 to upgrade Station KLXS to Channel 237C2. *See*, Public Notice released August 18, 1989, Report No. 1791.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-286

In the Matter of

Amendment of Section 73.202(b), RM-6609
Table of Allotments,
FM Broadcast Stations.
(Baker, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 5, 1990; Released: March 21, 1990

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 5009 (1989), issued in response to a petition filed on behalf of Mount Wilson FM Broadcasters, Inc. (petitioner), proposing the allotment of Channel 268B to Baker, California, as that community's first local broadcast service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 268B to Baker, since it could provide a first local broadcast service to that community.

3. As indicated in the *Notice*, Channel 268B can be allotted to Baker in conformity with the minimum distance separation requirements of the Commission's Rules.[1] Additionally, as Baker is located within 320 kilometers (199 miles) of the U.S.-Mexico border, the Commission obtained concurrence of the Mexican government in the proposal.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 7, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Baker, California	268B

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 268B at Baker, California, will open on **May 8, 1990,** and close on **June 7, 1990.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates used in this determination are 35-15-54 and 116-04-25. Additionally, because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-596

In the Matter of

Amendment of Section 73.202(b), RM-6430
Table of Allotments,
FM Broadcast Stations.
(Austin-Crothersville, Indiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 5, 1990; Released: March 21, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 714 (1989), proposing the allotment of Channel 287A to Austin or Crothersville, Indiana, or to both communities on a hyphenated basis, as a first local allotment. Petitioner filed comments, as did Dubois County Broadcasting, Inc. ("Dubois").[1] No other comments were received.

2. Petitioner requested the allotment of Channel 287A to Austin and Crothersville on a hyphenated basis. As stated in the *Notice*, hyphenation is an allotment tool used by the Commission in distinct factual situations, where the communities should be treated as one by reason of their proximity, similarity in population size, and shared common cultural and economic concerns. Austin (population 4,857),[2] in Scott County (population 20,600), and Crothersville (population 1,747), in Jackson County (population 37,300), are located 6.4 kilometers (3.4 miles) apart. Both Austin and Crothersville are incorporated communities which have their own post office and financial institutions. Petitioner was requested to furnish data to support a conclusion that Austin and Crothersville should be considered as one for allotment purposes. Petitioner was advised that in the absence of such justification, the Commission would favor the allotment to Austin, based on its larger population.

3. Dubois opposes consideration of proposed Channel 287A to either Austin or Crothersville since it would conflict with its proposal in MM Docket No. 88-126 to substitute Channel 287A for Channel 265A at Scottsburg, Indiana, to accommodate its modification plans at Huntingburg. Consequently, Dubois comments that Channel 224A may be allotted to either Austin or Crothersville to satisfy the petitioner's proposal.[3]

4. Petitioner's comments merely state its continuing interest in the proposed allotment of Channel 287A to Austin and Crothersville. Petitioner did not provide any evidence that Austin and Crothersville should be considered as one community for allotment purposes. Although Austin and Crothersville are located close to each other, petitioner failed to supply information to indicate that the residents of one community are dependent upon the other for economic, trade, cultural or social services, or that the two communities are so closely identified with each other that the allotment could not reasonably be made to only one community. In the absence of any evidence to support the petitioner's proposal to hyphenate the two communities, the Commission will allot Channel 224A (in lieu of Channel 287A),[4] to Austin only, as the larger of the two communities.

5. Channel 224A can be allotted to Austin in conformity with the minimum distance separation requirements of the Commission's Rules,[5] provided the transmitter is sited at least 2.5 kilometers (1.6 miles) north[6] of the community to avoid short-spacing to Station WBKR(FM), Channel 223C, Owensboro, Kentucky.[7]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 5, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Austin, Indiana	--	224A

7. The window period for filing applications on Channel 224A at Austin, Indiana, will open on **May 8, 1990,** and close on **June 7, 1990.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy V. Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Dubois is the licensee of Station WBDC(FM), Channel 265A, Huntingburg, Indiana.

[2] Population figures were taken from the 1980 U.S. Census.

[3] Dubois provided evidence to support its contention that although its comments, containing the alternate plan for a channel allotment to Austin or Crothersville, were served on the petitioner at the address given in its proposal, and as reflected in petitioner's comments to the *Notice*, they were returned by the U.S. Postal Service with the notation "insufficient address" for delivery. Dubois discharged its obligations under our rules since service of the document is complete upon mailing. *See* 47 CFR § 1.47(d),(f). Dubois' comments will be accepted.

[4] The substitution is consistent with Commission policy allowing, during the course of a rule making proceeding, allotment of a different channel of the same class requested, in order to ensure the most efficient use of the spectrum. *See Selma and Georgianna, AL*, 4 FCC Rcd 7584 (1989); and *Williston and Micanopy, FL*, 50 RR 2d 1425 (1982).

[5] Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

[6] Coordinates for Channel 224A at Austin are 38-46-03 and 85-48-14.

[7] Coordinates at the licensed site of Station WBKR(FM) are 37-36-29 and 87-03-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY, INC. — File No. I-T-C-90-045

Application for authority to acquire and operate facilities for packet switching services between Hawaii and the Federated States of Micronesia.

ORDER AND AUTHORIZATION

Adopted: March 15, 1990; Released: March 21, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on January 11, 1990 by GTE Hawaiian Telephone Company, Inc. (HTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite facilities for the provision of packet switching service between Hawaii and the Federated States of Micronesia (FSM). The application was placed on public notice on January 31, 1990. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-045 IS GRANTED, and HTC is authorized to:

a. lease from Comsat and operate one voice-grade satellite half-circuit between an appropriate earth station in Hawaii and an appropriate satellite over the Pacific Ocean, connecting with a similar circuit between the satellite and an earth station in the FSM, furnished by HTC's correspondent in the FSM; and

b. use said facilities to provide packet switching service between Hawaii and the FSM.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between HTC and its correspondent in FSM, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

WAHL COMMUNICATIONS VENTURES

File No. LMK-194

Request for Extension of Time
to Construct Station WNKX-703

ORDER

Adopted: January 25, 1990; Released: March 21, 1990

By the Commission:

1. On July 20, 1989, The Chief of the Land Mobile and Microwave Division, Private Radio Bureau, acting pursuant to delegated authority, denied a request for extension of time to construct Specialized Mobile Radio Service Station WNKX-703. This request was filed by WAHL Communications Ventures (WAHL). The Commission has before it for consideration WAHL's application for review of that action.

2. The application for review simply restates arguments made in WAHL's original request. We have reviewed the Bureau's action denying that request and find no error. Accordingly, IT IS ORDERED that pursuant to Section 1.115(g) of the Commission's Rules, the application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-119

In the Matter of

Amendment of Section 73.202(b), RM-6417
Table of Allotments,
FM Broadcast Stations.
(Stamping Ground, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 7, 1990; Released: March 22, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of James P. Gray ("Gray"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 4516 (1989), proposing the allotment of Channel 256A to Stamping Ground, Kentucky, as that community's first local FM service. Petitioner filed comments restating his intention to apply for the channel, if allotted. WHIO, Inc., ("WHIO"), licensee of Station WHKO(FM), Dayton, Ohio, filed comments. Gray filed reply comments.

2. WHIO in its comments states that spacing constraints in the direction of WHKO(FM), Channel 256A, Dayton, Ohio, restricts the available sites for the Stamping Ground allotment to a location no more than 3.7 kilometers outside the community. WHIO also contends that there is an extremely narrow area, at one point approximately 0.4 kilometers wide, in which a transmitter providing city grade coverage to Stamping Ground could be located in compliance with the Commission's minimum spacing requirements under the rules in existence at the time of the adoption of the *Notice*. WHIO also states that with the recent adoption of new and increased distance separation requirements, there will be no location where city grade coverage can be provided to Stamping Ground without a short spacing to Station WHNB, Channel 257A, Harrodsburg, Kentucky, or Station WHKO, Channel 256A, Dayton, Ohio. Finally, WHIO contends that a station at Stamping Ground would cause interference inside its .5 mV/m (54 dBu) contour.

3. Gray, in his reply comments, responds to WHIO's arguments. He states that the area where the transmitter could be located is 36 square kilometers (22 square miles), that many potential sites exist in the area for a transmitter site, and that he would be willing to provide a "certified site", if requested. Gray also states that the allotment should be based on the rules in effect at the time the proposal was filed. He states that WHIO operates at five times more than the effective radiated power allowed for its antenna height because of a "grandfathering" arrangement, and WHIO's engineering data is based on this overpower operation. Citing Section 73.209(a) of the Commission's Rules, he contends that WHIO's argument concerning interference is simply without merit.

4. In making allotments we require a reasonable assurance that a site or potential sites meeting the Commission's requirements would be available. The area in which Gray claims that a site could be located, although not exceptionally large, appears sufficient to warrant a finding of available sites. Furthermore, no party has raised any question as to the availability of any of the land within this area. Therefore, we conclude that a fully spaced site is available.

5. As for WHIO's claim of interference, WHIO is a grandfathered station and operates in accordance with Section 73.211 of the Commission's Rules. Section 73.209 of the Rules states that permittees and licensees of FM broadcast stations are protected from interference solely to the extent specified in the distance separation requirements and the rules governing maximum power and antenna heights. We agree with Gray that WHIO's arguments are without merit. Station WHKO is not entitled to any interference protection beyond that provided for by Section 73.209 of the Commission's Rules, and the allotment of Channel 256A at Stamping Ground meets the requirements of the Commission's rules.

6. In reference to the spacing requirements, the Stamping Ground petition was processed under the "old" separation requirements. *See Report and Order* in MM Docket 88-375, 4 FCC Rcd 6375 (1989). Because this petition was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

7. Based on the information before us, we believe that the public interest would be served by allotting Channel 256A to Stamping Ground, Kentucky, as that community's first local FM service. As stated in the *Notice*, Channel 256A can be allotted to Stamping Ground in compliance with the Commission's minimum distance separation requirements with a site restriction 3.3 kilometers (2.1 miles) north[1] in order to avoid a short-spacing to Station WHNB(FM), Channel 257A, Harrodsburg, Kentucky.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 7, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Stamping Ground, Kentucky	256A

9. The window period for filing applications will open on **May 8, 1990,** and close on **June 7, 1990.**

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates are North Latitude 38-18-04 and West Longitude 84-40-52.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-138

In the Matter of

Amendment of Section 73.202(b), RM-7040
Table of Allotments,
FM Broadcast Stations.
(Newnan and Peachtree City, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 7, 1990; Released: March 22, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by South Metro Broadcasting Co. Inc., (petitioner), licensee of Station WMKJ(FM), Channel 244A, Newnan, Georgia, seeking to amend the FM Table of Allotments by changing the community of license of Channel 244A from Newnan to Peachtree City, Georgia, and to modify its license accordingly.[1]

2. Petitioner states that Peachtree City, located in Fayette County, Georgia, had a population of 793[2] in 1970 and by 1980 the population had grown to 6,429. Peachtree City currently has no local service whereas Newnan presently has two other licensed stations.[3] Therefore, Newnan will not be deprived of its sole broadcast service. Petitioner also states that its Station WMKJ(FM) at Newnan is short-spaced to Station WKLS(FM), Channel 241C, Atlanta, Georgia, and that the Peachtree City allotment will also be short-spaced to Station WKLS. However, the short-spacing will decrease. Petitioner requests that WMKJ's "grandfathered" status be maintained at Peachtree City. The short-spacing was "grandfathered" under the provisions of Section 73.213.

3. An engineering analysis reveals that Channel 244A can be reallotted to Peachtree City in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 3.2 kilometers (2 miles)[4] southwest. The site restriction is necessary to maintain the present short spacing to Station WKLS(FM), Channel 241C, Atlanta, Georgia. The public interest may be served by proposing to change the community of license for Channel 244A from Newnan to Peachtree City, Georgia, as the change could provide Peachtree City with a first local service.

4. In view of the fact that Peachtree City could receive its first local service the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Newnan, Georgia	244A	-
Peachtree City, Georgia	--	244A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 14, 1990,** and reply comments on or before **May 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Mark E. Fields
Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Attorney for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See Report and Order,* MM Docket No. 88-526, 54 FR 26199, June 22, 1989.

[2] Population figures are taken from the 1980 U.S. Census.

[3] Stations WCOH(AM) and WNEA(AM) are currently licensed to Newnan, Georgia.

[4] The coordinates for Channel 244A at Peachtree City are North Latitude 33-22-46 and West Longitude 84-37-22.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-320

In the Matter of

Amendment of Section 73.202(b), RM-6752
Table of Allotments,
FM Broadcast Stations.
(Blackduck, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 7, 1990; Released: March 22, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 5639 (1989), issued in response to a petition filed by Roger Paskvan (petitioner), proposing the substitution of FM Channel 252C2 for 252A at Blackduck, Minnesota. Petitioner also requested modification of its construction permit (BPH-880426MB) for Channel 252A, to specify operation on Channel 252C2. Petitioner filed supporting comments in which he reaffirmed his interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 252C2 for 252A at Blackduck, Minnesota, since it could provide the community with its first wide coverage area FM station. The substitution can be made in compliance with minimum distance separation requirements of Section 73.207 of the Commission's Rules at the site specified by petitioner.[1] Since Blackduck is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained. In addition, we have authorized a modification of the petitioner's construction permit for Channel 252A, Blackduck, Minnesota, to specify operation on Channel 252C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 7, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Blackduck, Minnesota	252C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Channel 252A, Blackduck, Minnesota, IS MODIFIED TO SPECIFY operation on Channel 252C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 252C2 are 47-33-21 and 94-47-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-468

In the Matter of

Amendment of Section 73.202(b), RM-6889
Table of Allotments,
FM Broadcast Stations.
(Aberdeen, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 7, 1990; Released: March 22, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 7825 (1989), issued in response to a petition filed by Tenn-Tom Broadcasting Corporation (petitioner), proposing the substitution of FM Channel 287C3 for Channel 287A at Aberdeen, Mississippi, and modification of its license for Station WWZQ-FM, to specify the higher class channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel.[1]

2. We believe the public interest would be served by the substitution of Channel 287C3 for Channel 287A at Aberdeen, Mississippi, since it could provide the community with its first wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[2] In addition, we have authorized a modification of the petitioner's license for Station WWZQ-FM, Aberdeen, Mississippi, to specify operation on Channel 287C3 in accordance with Section 1.420(g) of the Commission's rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 7, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Aberdeen, Mississippi	287C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WWZQ-FM, Aberdeen, Mississippi, IS MODIFIED TO SPECIFY operation on Channel 287C3, in lieu of Channel 287A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The Report and Order in Docket 88-234 substituted FM Channel 287A for Channel 288A at Aberdeen, Mississippi, and modified the license for Station WWZQ-FM to specify operation on Channel 287A. That action was effective January 13, 1989.

[2] The coordinates for Channel 287C3 are 33-50-20 and 88-18-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-7

In the Matter of

Amendment of Section 73.202(b),	RM-6573
Table of Allotments,	RM-6603
FM Broadcast Stations.	
(Kimberling City, Seligman	
And Cassville,[1] Missouri)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 7, 1990; Released: March 22, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 1281 (1989), proposing the allotment of Channel 261A to Kimberling City, Missouri. The *Notice* was issued in response to a petition filed by Arthur C. Morris (Morris). Elvis Lee Moody (Moody) filed a counterproposal.[2] Morris and Aurora Broadcasting, Inc., filed comments supporting the channel at Kimberling City. Morris, Moody and Kevin M. and Patricia W. Wodlinger filed reply comments. On May 26, 1989, Arthur C. Morris filed comments withdrawing his interest in the allotment at Kimberling City. Max E. Easley filed late comments and Moody filed an opposition to those comments.[3]

2. The *Notice* proposed the allotment of FM Channel 261A to Kimberling City, Missouri, as that community's first FM broadcast service. The channel can be allotted to Kimberling City in compliance with spacing requirements with a site restriction 7.3 kilometers south of the community provided Channel 261A is deleted at Aurora, Missouri. *See MM Docket 87-474*, 2 FCC Rcd 6690 (1987).

3. Moody's Counterproposal requests the substitution of FM Channel 227C2 for Channel 237A at Seligman, Missouri, and modification of his license for Station KJEM-FM. To accommodate the substitution at Seligman, he further requests the substitution of FM Channel 261A for Channel 227A at Cassville, Missouri. One application is on file at the Commission for the channel at Cassville.[4]

4. Morris and Moody, in reply comments, continue to support their respective allotment requests. Kevin M. and Patricia W. Wodlinger (Wodlinger), applicant for Channel 227A at Cassville, Missouri, also filed reply comments. Wodlinger indicates it is the sole applicant for the Cassville channel and that the application was put on public notice on November 9, 1988, and no petitions to deny were filed during the 30 day filing period. Wodlinger contends that all that remains with respect to this application is for a construction permit to be issued. Wodlinger argues that for purposes of this Rule Making, he should be considered as the permittee for Channel 227A at Cassville, Missouri.

5. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making a new allotment to a community absent an expression of interest. Therefore, since the interest for a channel at Kimberling City, Missouri, has been withdrawn, and no other acceptable statement of interest has been filed, no further consideration will be given to an allotment in that community.

6. We believe the public interest would be served by the substitution of FM Channel 227C2 for Channel 237A at Seligman, Missouri. Channel 227C2 can be allotted to Seligman, at Moody's specified site, in accordance with the minimum distance separation requirements.[5] In addition, we have authorized a modification of Moody's license for Station KJEM-FM, Seligman, to specify operation on Channel 227C2 in accordance with Section 1.420(g) of the Commission's Rules since no other valid expressions of interest have been received. To accommodate the substitution at Seligman, we shall substitute Channel 261A for Channel 227A at Cassville, Missouri. Channel 261A can be allotted to Cassville, in compliance with the Commission's spacing requirements at the applicant's specified site for Channel 227A.[6] The applicant for Channel 227A at Cassville will be permitted to specify the new Class A channel and retain cut off protection, since the channels are equivalent.

7. As discussed above, we find the substitution of Channel 227C2 for Channel 237A at Seligman, Missouri, to be in the public interest. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 7, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Cassville, Missouri	261A
Seligman, Missouri	227C2

8. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KJEM-FM, Seligman, Missouri, IS MODIFIED TO SPECIFY operation on Channel 240C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this ORDER to the following:

Kevin M. and
Patricia W. Wodlinger
Rt. 1, Box 180
Verona, Missouri 65769

Dale Hendrix
Aurora Broadcasting,
Inc.
126 S. Jefferson
Aurora, MO 65605

10. In view of the foregoing, IT IS ORDERED, That the petition of Arthur C. Morris, IS HEREBY DISMISSED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Seligman and Cassville, Missouri, have been added to the caption.

[2] Public Notice of the Counterproposal was given on April 20, 1989, Report No. 1776 (RM-6603).

[3] Max E. Easley filed comments of interest after the comment period had expired. Because they were untimely filed, the comments have not been accepted in this proceeding.

[4] BPH-880629MA.

[5] The coordinates for Channel 227C2 are 36-26-40 and 94-05-30.

[6] The coordinates for Channel 261A are 36-37-00 and 93-48-31.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Correction of Part 74 of the
Commission's Rules

ORDER

Adopted: March 6, 1990; Released: March 22, 1990

By the Chief, Mass Media Bureau:

1. This *Order* amends the Commission's Rules to correct an omission in Title 47 of the Code of Federal Regulations. Specifically, the Commission makes an editorial change to 47 CFR Section 74.641 to clarify paragraph (b). This *Order* makes no substantive changes that impose additional burdens or remove provisions relied upon by licensees or the public. For these reasons, we believe that this revision will serve the public interest.

2. In order to ensure more efficient use of shared microwave spectrum, the Commission requires that fixed stations licensed after 1981 employ a specific category of transmitting antenna depending upon the level of congestion in their operating area.[1] Stations licensed before 1981 must be in compliance with the transmitter antenna standards by October 1, 1990 (a 10 year grandfather period was provided to minimize the impact to existing stations).

3. When the rules were adopted, the Commission recognized that there may be a need to require use of higher performance antenna in areas not formally designated as congested. Therefore, Section 74.641(b) sets forth conditions under which Category A antennas may be required in areas that are not congested. However, the word "not" was inadvertently omitted from the 3rd sentence of that paragraph. This *Order* corrects that omission.

4. This amendment is made under authority delegated by the Commission to the Chief, Mass Media Bureau. Because this amendment only interprets and clarifies the existing language of Section 74.641(b), prior notice of rule making is not required. 47 CFR Section 1.412(c). For this same reason, this amendment may become effective upon publication in the *Federal Register*. 47 CFR Section 1.427(b). Because a general notice of proposed rule making is not required, the Regulatory Flexibility Act does not apply.

5. Therefore, IT IS ORDERED, that pursuant to Sections 4(i) and 303(r), of the Communications Act of 1934, as amended, and Sections 0.61 and 0.283 of the Commission's Rules, Part 74 of the FCC Rules and Regulations IS AMENDED as set forth below, effective upon publication in the *Federal Register*.

6. For further information, contact Hank VanDeursen, Engineering Policy Branch, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX

47 CFR Part 74 is amended as follows:

1. The authority citation for Part 74 continues to read as follows: Authority: 47 U.S.C. Sections 154 and 303.

2. Section 74.641 is corrected by revising paragraph (b) to read as follows:

Section 74.641 Antenna Systems.

* * * * *

(b) Any fixed station licensed pursuant to applications for filing prior to October 1, 1981, may continue to use existing antenna systems, subject to periodic renewal until October 1, 1991. After October 1, 1991, all licensees are to use antenna systems in conformance with the standards of this Section. TV auxiliary broadcast stations not located in areas subject to frequency congestion are to employ a category A antenna when:

* * * * *

FOOTNOTE

[1] *See Second Report and Order* in Docket No. 21505, Adopted October 21, 1980, FCC 80-604, released November 14, 1980, 82 FCC 2d 354 at 14 and 19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-60

In re Applications of

EASTERN COMPANY D/B/A EASTCO (hereafter "Eastco") File No. BPH-871223MR

RONALD MORLINO (hereafter "Morlino") File No. BPH-871224MF

RADIO SOUTH BURLINGTON, INC. (hereafter "Radio South") File No. BPH-871224MJ

For Construction Permit
for a New FM Station
on Channel 236A (95.1mHz)
in Sunderland, Vermont.

HEARING DESIGNATION ORDER

Adopted: February 7, 1990; Released: March 22, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On February 22, 1989, Eastco filed a "Motion to Enlarge Issues" against Radio South. Since the Commission's *Report and Order in Re: Revised Procedures for Processing of Contested Broadcasting Applications; Amendments of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the pleading will be dismissed and an opportunity to raise any allegations contained therein will be afforded the parties post-designation.

3. *City coverage.* None of the applicants in this proceeding provides 3.16 mV/m coverage to 100% of Sunderland, the community of license. Each has requested a waiver of 47 C.F.R. § 315(a), claiming that, due to a 2.4 kilometer site restriction imposed to protect Station WRSI(FM), Greenfield, Massachusetts, there are no sites which would enable the applicants to comply with both the spacing and city coverage rules. Each applicant also points out that the majority of the area not receiving city-grade service are unpopulated lands within the Green Mountain National Forest.

4. We believe that the applicants have demonstrated circumstances which warrant a waiver of Section 315(a). However, the proposals reflect several discrepancies which we believe require an explanation. For instance, while the coverage area proposed by each applicant appears to be nearly identical, Eastco and Radio South state that they cover 53% of the area of Sunderland Township, while Morlino claims to cover but 35%. Similarly, while Morlino and Radio South propose to cover over 95% of Sunderland's population, Eastco claims only 43% population coverage. Therefore, Morlino will be required to submit an explanatory amendment regarding its area coverage, and Eastco will be required to submit an explanatory amendment regarding its low population coverage.

5. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. Section 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANT	DATE OF AMENDMENT
Eastco	September 16, 1988, November 14, 1988 November 15, 1988, December 14, 1988, October 27, 1989
Radio South	August 23, 1988, January 3, 1989

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED That Eastco's February 27, 1989 Motion to Enlarge Issues IS DISMISSED.

9. IT IS FURTHER ORDERED, That the requests for waiver of 47 C.F.R. § 73.315(a) filed by all applicants ARE GRANTED.

10. IT IS FURTHER ORDERED, That Morlino and Eastco shall submit the explanatory amendments called for in paragraph 4 above within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein:Radio South, Eastco.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-118

In re Applications of

D.C. JONES File No. BPH-880519NN

ACADIANA File No. BPH-880519OC
LIMITED PARTNERSHIP
(hereafter "Acadiana")

For Construction Permit
for a New FM Station on Channel 229C2
in New Iberia, Louisiana

HEARING DESIGNATION ORDER

Adopted: February 28, 1990; Released: March 22, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. The Federal Aviation Administration has determined that the antenna proposed by Acadiana would constitute a hazard to air navigation. Accordingly, an issue will be specified and the F.A.A. made a party to the proceeding.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Acadiana would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of:

KQED, INC. San Francisco, California	**MM DOCKET NO. 85-396**
For renewal of licenses of noncommercial stations	
KQED-FM	File Nos. BRED-237, BRED-800801ZS and BRED-830801WD
KQED-TV, and	File Nos. BRET-25, BRET-800801LQ and BRET-830801LK
KQEC(TV)	File Nos. BRET-203 and BRET-800801LV
KQED, INC. San Francisco, California	**MM DOCKET NO. 84-567** File No. BRET-830801LJ
For renewal of license of noncommercial educational station KQEC(TV), Channel 32, San Francisco, California	
MINORITY TELEVISION PROJECT	**MM DOCKET NO. 84-568** File No. BPET-831101KI
For a construction permit for a new noncommercial educational television station on Channel 32, San Francisco, California	

ORDER

Adopted: February 8, 1990; Released: March 21, 1990

By the Commission: Commissioner Quello concurring and issuing a separate statement.

1. Before the Commission for consideration are: (1) an Application for Review of KQED, Inc. filed June 16, 1988, and oppositions filed July 1, 1988 by the California Public Broadcasting Forum *et al.* (Forum) and the Mass Media Bureau; (2) an Application for Review of California Public Broadcasting Forum *et al.* filed June 15, 1988, and an opposition filed June 30, 1988 by KQED; (3) Mass Media Bureau's Application for Review filed June 15, 1988, and an opposition filed June 30, 1988 by KQED; (4) an Application for Review of Minority Television Project, Inc. (MTP) filed June 16, 1988, and an opposition filed June 30, 1988 by KQED; (5) a Motion to Strike [KQED's opposition under (2)] filed July 18, 1988 by Forum, an opposition filed July 26, 1988 by KQED, and a reply (accompanied by a motion for leave to file) filed August 5, 1988 by Forum; (6) a Motion to Reopen the Record filed November 10, 1988 by KQED, oppositions filed November 22, 1988 by the Bureau and November 30, 1988 (accompanied by a motion for leave to file) by MTP, and a reply filed December 5, 1988 by KQED; and (7) a Motion to Reopen the Record filed November 15, 1989 by KQED, comments filed November 27, 1989 by the Bureau, an opposition (accompanied by a motion for leave to file) filed December 15, 1989 by MTP, and a reply filed December 26, 1989 by KQED.

2. These pleadings relate to a decision of the Review Board that: (1) denied KQED renewal of its license for KQEC(TV), channel 32, San Francisco, California; (2) renewed KQED's licenses for KQED-TV, channel 9, San Francisco, California, and KQED-FM, San Francisco, California; and (3) granted MTP's application for a construction permit for the facilities of KQEC(TV). *KQED, Inc.*, 3 FCC Rcd 2821 (Rev. Bd. 1988). *See also KQED, Inc.*, 2 FCC Rcd 352 (I.D. 1987).

I. KQED'S QUALIFICATIONS

3. We agree with the Board's action denying renewal of KQEC(TV), and we therefore adopt its decision except as otherwise indicated below. The record indicates that KQED committed serious misconduct by lacking candor about and misrepresenting the reasons for deactivation of KQEC(TV) beginning in January 1980. The record shows that on December 20, 1979, KQED's board of directors adopted a resolution authorizing the deactivation of channel 32 as a means of alleviating KQED's financial problems. The effect of this resolution was to delete funds for the operation of channel 32 throughout the remainder of KQED's fiscal year, from January 1, 1980 through August 31, 1980. In accordance with the resolution, further action would be required to reactivate the station. 3 FCC Rcd at 2823 ¶ 11; 2 FCC Rcd at 360 ¶ 79.[1] *See also* 3 FCC Rcd at 2823 ¶¶ 7-11 (the background of the board resolution).[2]

4. KQED in fact suspended operation on channel 32 from January 1, 1980 to May 29, 1980. On three occasions -- December 27, 1979, February 25, 1980, and April 22, 1980 -- KQED ostensibly notified the Commission about the status of the station. These notifications, however, did not disclose the board's budgetary action, but, instead, stated only that the station had been shut down for technical reasons associated with the replacement of switcher equipment. 3 FCC Rcd at 2822 ¶ 6.[3] Even after the Commission learned of the board resolution, as the result of a complaint, KQED attempted to characterize its action as related to the switcher replacement, and not a general budgetary measure. *See, e.g.*, 3 FCC Rcd at 2824-25 ¶ 17; 2 FCC Rcd at 361 ¶ 86. KQED followed this approach knowing that the Commission had previously expressed disapproval of prior action by KQED deactivating channel 32 for budgetary reasons.[4] *See KQED, Inc.*, 57 FCC 2d 264, 269 ¶¶ 18-19, 270 n.8 (1975), *recon. granted in part*, 58 FCC 2d 751, *recon. denied*, 60 FCC 2d 976 (1976).[5] We therefore conclude -- as did the Board -- that KQED did not accurately represent the reasons that the station was off the air, and misled the

Commission as to KQED's intentions regarding the station and the role that budgetary considerations played in KQED's actions. Such conduct violates the fundamental duty of a licensee to deal honestly with the Commission. *Character Qualifications*, 102 FCC 2d 1179, 1211 ¶ 61 (1986), *recon. denied*, 1 FCC Rcd 421 (1986). The record thus fully justifies the denial of KQEC(TV).

5. Nonetheless, we wish to clarify one matter. As the ALJ in this case found, KQED presented evidence that there were significant engineering problems associated with operating channel 32 during the switcher replacement (although it would have been technically possible to keep the station on the air). 2 FCC Rcd at 373 ¶ 182. KQED claims that the Board ignored this evidence. We wish to make clear that even if engineering problems did exist, it does not excuse KQED's failure to be honest with the Commission about the nature of its actions. Having made a decision to deactivate the station for budgetary reasons, KQED may not rely on the circumstance that it might fortuitously have been able to justify deactivating the station on the basis of engineering considerations. This is especially so, since the record indicates that KQED did not seriously study the costs of maintaining channel 32 on the air during the switcher replacement. *See* 3 FCC Rcd at 2824 ¶ 14; 2 FCC Rcd at 357 ¶¶ 49-51, 359 ¶ 67. The Commission should not have to guess when it might have been feasible to reactivate channel 32 if KQED's motivation had been different. Thus, it is not essential to find that technical problems had no role at all in KQED's actions. *See* 3 FCC Rcd at 2825-26 ¶¶ 21-22. Similarly, it is not essential to find that KQED's original notification to the Commission, on November 2, 1979, that the station would be temporarily deactivated from November 5 through December 8, 1979, because of the switcher replacement, reflected the same degree of dishonesty as later communications, after the board's resolution. *See id.* at 2826 ¶ 22.

6. We agree with the Board's conclusion that KQEC(TV)'s meritorious programming does not mitigate the misconduct found here. 3 FCC Rcd at 2827 ¶¶ 26-28. The Board aptly noted that the Commission has a long-standing policy that meritorious programming does not mitigate serious deliberate misconduct such as misrepresentation. *See Character Qualifications*, 102 FCC 2d at 1211 n.79. The Commission does, however, consider meritorious programming mitigating in cases involving less serious misconduct. *See WIGO, Inc.*, 85 FCC 2d 196, 212 ¶ 50 (1981). In particular, we wish to note that we do not believe that actions in the *RKO* proceedings suggest a different approach. There, after the Court of Appeals affirmed the Commission's denial of RKO's Boston station, the court directed the Commission to hold hearings on RKO's qualifications to retain its co-owned stations, including hearings with regard to the programming records at those stations. *RKO General, Inc v. FCC*, 670 F.2d 215, 237 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927, 457 U.S. 1119 (1982). Like the Board, we believe that the court's reference to programming relates to factors particularly involved in the grant or denial of RKO's other stations and does not mandate a departure from the Commission's long-standing policy. To the extent that language in the Commission's decision in the *RKO* Boston proceeding may suggest a departure from our policy, we specifically disavow it. *RKO General, Inc.*, 78 FCC 2d 1, 109 ¶ 231 (1980).

7. While we affirm the Board's denial of KQEC(TV), we also affirm its renewal of co-owned stations KQED-TV and KQED-FM based upon Commission policy indicating that the loss of a single station is an appropriate sanction in response to the type of misconduct found in this case. *See, e.g., Character Qualifications*, 102 FCC 2d at 1228 ¶ 103. We expect that the loss of KQEC(TV) will deter any recurrence of misconduct by KQED and that the licensee will take whatever steps are necessary to ensure that no further misconduct occurs.

II. MTP'S QUALIFICATIONS

8. We must also address KQED's motions to reopen the record, which relate to MTP's financial qualifications. By way of background, MTP relies, to establish its financial qualifications, on grants from the National Telecommunications and Information Administration (NTIA) and the California State Department of Education. KQED has argued throughout this proceeding that MTP is ineligible to receive these grants. The Board, however, correctly rejected these arguments as a basis to deny MTP's application. 3 FCC Rcd at 2830-31 ¶ 41.

9. Under Commission policy, a noncommercial applicant may certify that its application is contingent on a grant from NTIA or other appropriate source. *Application Forms*, 52 RR 2d 1362, 1364 (1982). As to such grants, the applicant is required to do no more than to advise the Commission when the funds are committed or appropriated. *Id.* As these provisions indicate, it is appropriate to inquire only whether the grants relied on have actually been made, not whether they are likely to be made.

10. Similarly, in *Alabama Citizens for Responsive Public TV, Inc.*, 69 FCC 2d 1061, 1072-74 ¶¶ 29-34 (1978), the Commission deleted a funds availability issue added by the Board based on allegations that the applicant was ineligible for a federal grant. The Commission held that it would defer to the granting agency with respect to questions regarding eligibility and would make grant of the broadcast application contingent on a showing, within a reasonable time, that the grant funds were in fact available. Consistent with this precedent, no inquiry will be made as to whether MTP is eligible for the NTIA and state grants. Instead, an appropriate condition will be put on any grant to MTP, as was done in *Alabama*.

11. KQED's motions to reopen the record seek to introduce further evidence that allegedly casts doubt on MTP's eligibility to receive the NTIA and California grants. This evidence consists of a series of letters from NTIA, which, according to KQED, raise questions about whether the state funds will be available or whether they will qualify as non-federal matching funds for purposes of the NTIA grant.

12. As the preceding discussion indicates, however, we will not inquire into MTP's eligibility for these grants. Thus, the proffered evidence is not of decisional significance and is not a basis to reopen the record. *See The News - Sun Broadcasting Co.*, 27 FCC 2d 61, 62 ¶ 3 (1971).

13. ACCORDINGLY, IT IS ORDERED, That the Motions to Reopen the Record filed November 10, 1988 and November 15, 1989 ARE DENIED.

14. IT IS FURTHER ORDERED, That pursuant to 47 C.F.R. § 1.115(g) the following applications for review ARE DENIED: (1) Application for Review of Minority Television Project, Inc. filed June 16, 1988; (2) Mass Media Bureau's Application for Review filed June 15, 1988; (3) Application for Review of California Public Broadcasting Forum, *et al.* filed June 15, 1988; and (4) Application for Review of KQED, Inc. filed June 16, 1988.

15. IT IS FURTHER ORDERED, That the Motion to Strike filed July 18, 1988 by California Public Broadcasting Forum *et al.* IS DISMISSED as moot.[6]

16. IT IS FURTHER ORDERED, That the applications of KQED, Inc. for renewal of its licenses to operate stations KQED-TV and KQED-FM (File Nos. BRET-25, BRET-800801LQ, and BRET-830801LK, and BRED-237, BRED-800801ZS, and BRED-830801WD) ARE GRANTED.

17. IT IS FURTHER ORDERED, That KQED's applications for renewal of license of KQEC(TV) (File Nos. BRET-203, BRET-800801LV, and BRET-830801LJ) ARE DENIED.

18. IT IS FURTHER ORDERED, That KQED, Inc. IS AUTHORIZED to continue operation of station KQEC(TV) until 12:01 a.m. of the ninety-first (91st) day following the release of this order to enable the licensee to conclude the station's affairs; PROVIDED, HOWEVER, That if the licensee seeks reconsideration or judicial review of our order, it IS AUTHORIZED to continue to operate the station until 12:01 a.m. of the ninety-first (91st) following the release of any order on reconsideration or the completion of judicial review, whichever is later. Judicial review is completed when the forum which has jurisdiction to review this proceeding issues its mandate; provided, however, that in a case when the mandate issues prior to the expiration of the period for seeking Supreme Court review and the licensee seeks Supreme Court review, judicial review will not be completed until the Supreme Court denies the petition for certiorari or issues a ruling on the merits affirming the denial of renewal, whichever occurs later.

19. IT IS FURTHER ORDERED, That the application of Minority Television Project, Inc. for a new noncommercial educational television station on channel 32, San Francisco, California (File No. BPET-831101KI) IS GRANTED, on the condition that it submit satisfactory proof to the Commission within a reasonable period of time that it has received the proposed funding from the NTIA and the State of California.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Contemporaneous documents corroborate the testimony that funds for the operation of channel 32 were deleted from the budget. *See* Forum Exhs. 39, 53 (February 1980 documents indicating that a budget modification was necessary to permit a temporary reactivation of channel 32 to conduct an auction). KQED observes that the record does not disclose that a board resolution was enacted to reactivate channel 32 permanently, suggesting that the December 20 resolution therefore did not have the effect of deactivating the station. But in view of the preceding evidence demonstrating the board's intentions, we are not persuaded that the silence of the record concerning the reactivation of KQEC(TV) should be construed favorably to KQED.

[2] One piece of evidence that KQED's management intended to shut down channel 32 in January 1980 irrespective of the switcher replacement warrants special comment. This evidence consists of the fact that the December 1979 issue of KQED's *Focus* magazine -- which for convenience, contains program listings for the first few days of January 1980 -- lists no regular programming for channel 32 beginning January 1. Forum Exh. 60 at 64-65. The record indicates that *Focus* generally goes to press three weeks before it is delivered to viewers -- in this case, probably by early November. Tr. 328, 394. KQED claims that there may be an innocent explanation for the omission of these listings, without describing what that might be. The Board found KQED's contention unpersuasive. 3 FCC Rcd at 2825 ¶ 20. In any event, the circumstances surrounding the publication of *Focus* are peculiarly within the knowledge of KQED, its publisher. Thus, KQED had the burden of providing any exculpatory explanation and failed to meet that burden. *See Elyria-Lorain Broadcasting Co.*, 6 RR 2d 191, 189 ¶ 17 (1965).

[3] KQED was more candid with its viewers than with the Commission. It disclosed the budgetary nature of the board resolution in its viewer magazine and apparently in response to any viewer complaints about the deactivation of channel 32. *See* Forum Exhs. 9, 10 at 2, 37 at 2. KQED also candidly discussed the matter with its own staff. *See*, for example, Forum Exhs. 29, 43. KQED suggests that it would not have been so candid in its public statements if it intended to deceive the Commission. This, however, ignores the gross disparity between what KQED told the public and what it told the Commission. In its statements to the public about its action, KQED made no mention of the switcher replacement; in its statements to the Commission, KQED did not acknowledge the role of general budgetary considerations. While KQED acknowledged the existence of the board resolution in a February 4, 1980 letter responding to a complaint by Henry Kroll about its action (a copy of which was sent to the Commission), KQED described the resolution in ambiguous terms that did not address the general budgetary considerations behind the resolution. Forum Exhs. 35-36; Tr. 1068-69. Forum Exh. 35, the internal cover letter associated with the response, states: "Since we must copy the Commission, the concern is we give [Kroll] as small an opportunity for future response as possible."

[4] That the Commission on reconsideration allowed KQEC(TV) to remain dark for an additonal period of time for financial reasons, among others, did not suggest, contrary to KQED's assertion, that the Commission would be similarly disposed in the future. The Commission's order clearly stated: "No further extensions are contemplated." 58 FCC 2d at 735 ¶ 6. To underscore its intentions, the Commission held KQEC(TV)'s renewal application in deferred status pending the resumption of service. *Id.* at n.5.

[5] KQED's management consulted with counsel (Forum Exhs. 11, 13) and took pains to inform the Commission (Tr. 808) about the switcher replacement. It, however, took no similar precautions with respect to the budget resolution, which was clearly more relevant to the concerns expressed in the Commission's earlier orders. *See, e.g.*, Tr. 1069. This discrepancy in KQED's actions provides additional evidence that KQED made a conscious decision not to deal honestly with the Commission

concerning the board resolution. It further rebuts KQED's argument that KQED had no motive to mislead the Commission in view of the Commission's earlier action granting an extension of time during which KQEC(TV) could remain dark.

[6] Forum complains that material in KQED's opposition effectively supplements its application for review. Because we have denied KQED's application for review, the matter is moot. As an additional matter, good cause having been shown, we grant the various requests for leave to file late pleadings.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

I agree with the result that the application to renew the license of KQEC(TV) should be denied. I write separately, however, to ensure that the significant level of meritorious service provided by KQED-TV and KQED-FM is not ignored.

As the majority correctly notes, meritorious programming does not mitigate the misconduct *with respect to KQEC*. But it is important to note that the consistently high level of service provided by stations KQED-TV and KQED-FM provides an additional justification in support of their renewal, despite our decision on the KQEC license. *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-559

In re Applications of

A. P. WALTER, JR. File No. BPH-870824MS

LADIES III BROADCASTING, INC. File No. BPH-870824MV

For Construction Permit for a New FM Station on Channel 286C in Panama City, Florida

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: March 12, 1990; Released: March 21, 1990

Appearances

Dennis J. Kelly on behalf of A. P. Walter, Jr. and *Ellen S. Mandell* and *Peter Gutmann* on behalf of Ladies III Broadcasting, Inc.

1. The applications listed in the caption and two others that have been dismissed were designated for a comparative hearing on December 2, 1988. 4 FCC Rcd 652 (1989). The following issues remain to be decided in this decision:

1.

(1) To determine whether Ladies III Broadcasting, Inc. is financially qualified to become a Commission licensee.

(2) To determine whether Ladies III Broadcasting, Inc.'s certification of its financial qualifications was reliable and truthful and, if not, whether Ladies III Broadcasting, Inc. should be disqualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. A prehearing conference was held on March 21, 1989. *Order*, FCC 89M-917, released March 23, 1989. Written testimony was exchanged on September 13, 1989 and supplemented by Ladies on September 20, 1989. On October 2, 1989, a hearing was held to examine the written testimony. Tr. 10-126. The record was closed on October 2, 1989. *Order*, 89M-2406, released October 4, 1989. Both applicants filed proposed findings of fact and conclusions on October 25, 1989 and replies on November 8, 1989.

FINDINGS OF FACT

Issue 1.

Whether Ladies' financial certification was reliable and truthful and whether Ladies is financially qualified

3. Ladies filed its application on August 24, 1987 and Barbara Hoy, who is President of Ladies, a director and 35% stockholder, certified that the applicant was financially qualified on August 21, 1987. Ladies Exh. 7, at 1. Ladies Exh. 1, at 1. She had "primary responsibility for determining Ladies' financial qualifications." Ladies Exh. 7, at 1. She represents that she made a determination of the costs in July 1987 without preparing a formal document. *Id.* She relied on an equipment proposal prepared by Harris Corporation which she received from Ladies' engineering consultant, John Mullaney Engineering, Inc., budget notes and oral understandings. *Id.*, at 1-2. Her notes and understanding of the cost was derived from her broadcast experience, other Florida station operators, and her knowledge of the area based on her experience as a resident. *Id.*, at 2. She represented that Jack Mullaney prepared and gave her the estimates for construction costs before she certified. Tr. 66-67.

4. Ms. Hoy submitted her notes which she observed did not in all respects reflect her plan. *Id.*, at 2. The budget items she claims she assumed in 1987, she reconstructed in 1989 for the hearing on this issue. *Id.* The Mullaney engineering firm estimated that the station could be constructed for $205,000 to $250,000, she claims. *Id.* She states that that range included modifying an existing AM tower to permit installation of Ladies' antenna. *Id.* Ms. Hoy states that she relied on Mullaney's representation that the equipment could be delivered for 20 to 25 percent down. *Id.*, at 3. Ms. Hoy points out that she made the same statements at her deposition. Namely, that she had received estimates from Mullaney in 1987 and that then she had made a written estimate of the costs. *Id.*

5. Ms. Hoy explained how she estimated the studio and office rent, the tower site rent, salaries, and general operating expenses. *Id.*, at 4-6. She relied on loan letters from the Barnett Bank in Tallahassee, Florida and a letter from the Third National Bank in Nashville, Tennessee. *Id.*, at 6. The letters were dated August 7 and 12, 1987, respectively, and each promised $250,000. *Id.*, at 7, 48, 50. She represents that she estimated the costs to be $221,732.12. *Id.*, at 8. In November 1987, Ladies changed its antenna site to a location where it would need to construct a tower and acquire land. After these changes, Ms. Hoy represents she recalculated the costs of construction. *Id.*, at 8-9. The banker who approved the letter at Barnett Bank, Booker Moore, went to work at Tallahassee State Bank in November 1988; on December 14, 1988, Ms. Hoy obtained another letter for $250,000 from the Tallahassee State Bank. *Id.* at 9, 71. In April 1989, Ms. Hoy sought equipment estimates from five equipment suppliers. *Id.*, at 10. Those estimates ranged from $75,000 to nearly $300,000. *Id.* She now believes that the station expenses will be $405,145.00. *Id.*, at 12.

6. Shirlee Phillips, who owns 49% of Ladies' stock and is a director and vice president, explained that she did not obtain the letter from the Third National Bank in Nashville but her spouse did. Ladies Exh. 9. She asked her spouse to obtain the letter because he was in Nashville and was known to the bank. *Id.* Ms. Phillips does not know what collateral the bank might require. Tr. 104. Brian Williams who issued the letter corroborated Ms. Phillips' testimony. Ladies Exh. 11. Mr. Williams stated that the bank would lend the money to Ms. Phillips if the conditions outlined in the letter were met. *Id.* Mr. Williams told Mr. Phillips that collateral would be required. Tr. 23. One of the requirements of the letter was to determine whether Ms. Williams is credit worthy. Mr. Williams had no information about Ms. Phillips' credit, but he did have her tax returns. Tr. 28. Mr. Williams said that the bank's collateral could be land or equipment. Tr. 37.

Issue 2:

On a comparative basis, which applicant's proposal best serves the public interest?

Participation by owners in operation of the station

7. *A. P. Walter* is an individual applicant and he does not propose to work at the station. Walter Exh. 1.

8. *Ladies* is a corporation with three stockholders, Barbara Hoy, Shirlee Phillips, and Terralynn Hoy. Ladies Exh. 1. They each have proposed to work at the station. Ms. Hoy has promised to work full time, 40 hours per week, as the general manager. Ladies Exh. 3. She will establish, institute and implement policy. *Id.* Terralyn Hoy has promised to work full time, 40 hours per week, as the sales manager. Ladies Exh. 4. She will develop sales policies and strategies for the station. *Id.* Shirlee Phillips has promised to work full time, 40 hours per week, as the program director. Ladies Exh. 5. She will be responsible for entertainment programming and production. *Id.* All of the Ladies' stockholders have qualitative attributes but because Mr. Walter has not proposed to work at the station, there is no comparative relevance to their qualitative attributes.

Ownership interests in the mass media of communications

9. Mr. Walter has no mass media interest. Walter Exh. 1. Ladies and its stockholders do not have cognizable mass media interests. Ladies Exh. 2.

Auxiliary power

10. Both Walter and Ladies propose to install auxiliary power systems. Walter Exh. 1; Ladies Exh. 6.

Areas and populations

11. The parties stipulated that there is no significant comparative difference between their technical proposals. Joint Exh. 1.

CONCLUSIONS

Issue 1:

Ladies financial certification was reliable and truthful and it is financially qualified.

12. Ladies' president, Barbara Hoy, before she certified in 1987 obtained estimates of the cost of construction and operation. She did not prepare an exhibit of her estimates but some of the costs were in writing and some were encompassed in notes she made at the time. She estimated that the station would require somewhere between $205,000 and $250,000. To meet these estimates, she and Shirlee Phillips each obtained bank letters promising to lend $250,000. With those promises, she believed she had more than enough money to meet her estimates. Following her original estimate, Ladies changed its antenna site and the new site required construction of a tower and the purchase or lease of land. She again gathered information about the additional expenses and she now estimates that Ladies will need $405,145.00. She also has obtained an additional bank letter. The record supports Ladies' contention that its certification was and is reliable and truthful and that it is financially qualified.

13. Walter urges that Ladies' showing is faulty because Ladies did not receive written assurance from the equipment leasing company that they would extend a lease to Ladies. He also argues that Ladies will have to pay cash for the land and tower at a price of $225,000 and $325,000. Walter maintains that Ladies will need $550,000, which is $50,000 more than it has available. Ms. Hoy, Ladies responds, never intended to purchase the land but only to lease the site for the tower. Tr. 81, 91. Ladies concedes that it did not request a lease from an equipment manufacturer but it urges that a lease was not required unless Ladies had a history of bad credit since the Commission assumes that leases secured by equipment are routinely available. *Citing, Merrimack Valley Broadcasting, Inc.*, 82 F.C.C.2d 166, 168 (1980). There is no reason to expect that an equipment supplier would not lease equipment to Ladies. Ladies points out that it did estimate the costs of leasing, including a 25% downpayment, and sought information from a variety of equipment suppliers about the purchase price of equipment. Contrary to Walter's claim, Ladies' application is not inherently incredible like that found by the Review Board in *Pepper Schultz*, 4 FCC Rcd 6393 (Review Bd. 1989). Ladies has no history of being a poor credit risk and it did determine the cost of the equipment.

14. Walter also faults Ladies for not including legal costs in its original assessment of its qualifications. That is a small omission since Ladies originally had a cushion of over $200,000. When such an amount is missing the Bureau usually adds in $5,000 for hearing legal fees and $6,000 for the filing fee. *See Columbus Broadcasting Corp.*, 3 FCC Rcd 5480 (1988). There is little doubt that Ladies can meet those expenses. Moreover, in its most recent estimate, Ladies did include legal fees.

15. Walter urges that the bank letter from the Third National Bank in Nashville was merely an accommodation to stockholder Shirlee Phillips' spouse, since his businesses are regular customers of the bank. That does not appear to be the case. Bank vice president, Brian Williams, testified that he reviewed the joint income of the Phillips. He stated that he made an assessment of the proposal based on his knowledge of the industry; he

explained that his specialty at the bank is making loans in the entertainment industry. He appeared in this proceeding and stated that the bank would like to make the loan. His testimony established that he had given the matter of collateral some thought and he believed Shirlee Phillips was financially able to undertake the loan. Walter points to the elements of accommodation letters in *Dutchess Communications Corp.*, 101 F.C.C.2d 243 (Rev. Bd. 1985). But here several of the elements that were present in that case are missing. The bank did assess Ms. Phillips creditworthiness and it did consider collateral. *See The Baltimore Radio Show*, 4 FCC Rcd 6437, 6444 (Review Bd. 1989). While it made no decision about collateral, Mr. Williams said that it was a negotiable matter that would be determined when the loan is made and that the amount of collateral would depend on how much the stockholders contributed to the venture. *See* Tr. 29, 30, 36. Walter also appears to argue that the amount promised by the Third National Bank exceeded the lending limit of the bank. The testimony does not reflect what limits the bank had and Walter does not show that it is not at least $250,000. There was a question raised by Walter about whether Mr. Williams could commit that amount of money at the time without the approval of another bank official. Mr. Williams was not an officer of the bank then, although he is now. Mr. Williams' testimony shows that he did not remember what his limit was. More importantly, he stated that he did not need additional approval in order to issue the letter, regardless of his lending limit. Walter does not establish that the facts are different. Ultimately, Mr. Williams reiterated the bank's intention to lend the money.

16. Ladies made a sincere and conscientious effort at assessing its financial qualifications. There is no evidence that it sought to deceive the Commission. Walter has not shown Ladies to be unqualified.

Comparison of the Applicants

17. The only difference in the comparative proposals of the applicants is in their promises to work at the station full time. Walter has not promised to work at the station and all of the Ladies' stockholders have promised they will. Because Ladies is otherwise qualified, it will receive the grant.

ACCORDINGLY, IT IS ORDERED that the application of A. P. Walter, Jr. (File No. BPH-870824MS) IS DENIED and the application of Ladies III Broadcasting, Inc. (File No. BPH-870824MV) for a construction permit for a new commercial FM station on Channel 286C2 at Panama City, Florida IS GRANTED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Seciton 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-106

In re Applications of

INTERMART BROADCASTING GULF COAST, INC. (hereafter: Intermart)	File No. BPH-880224MN
CHRISTINE HARVEL (hereafter: Harvel)	File No. BPH-880301NB
SOUTHWEST FLORIDA FM BROADCASTING, LTD. (hereafter: Southwest)	File No. BPH-880303MG
Byron Douglas Kight & Mary Giglia Martinez Johnson d/b/a KIGHT BROADCASTING LIMITED PARTNERSHIP (hereafter: Kight)	File No. BPH-880303MH
PETER B. FULTON (hereafter: Fulton)	File No. BPH-880303MJ
DEBORAH G. ABBOTT (hereafter: Abbott)	File No. BPH-880303MK
SUNSET COASTAL BROADCASTING, INC. (hereafter: Sunset)	File No. BPH-880303ML
SCHEFFLERA, INC. (hereafter: Schefflera)	File No. BPH-880303MN
PATRICK BROADCAST ASSOCIATES, INC. (hereafter: Patrick)	File No. BPH-880303MO
JIM - TAN BROADCASTING, INC. (hereafter: Jim-Tan)	File No. BPH-880303MP
PALM TREE FM LIMITED PARTNERSHIP (hereafter: Palm Tree)	File No. BPH-880303MQ

For Construction Permit for a
New FM Station on Channel 249A,
Punta Rassa, Florida

HEARING DESIGNATION ORDER

Adopted: February 27, 1990; Released: March 21, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Southwest.* On December 16, 1988, Southwest petitioned for leave to amend its application. The petition was accompanied by an amendment specifying a new transmitter site. The accompanying amendment was filed after the last date for filing minor amendments as of right. In support of its request for acceptance of the late-filed amendment, Southwest stated that it had been advised by the Federal Aviation Administration (FAA) that a "Determination of No Air Hazard" clearance could not be issued for its proposed transmitter site. Southwest has made the requisite good cause showing, pursuant to 47 C.F.R. § 73.3522(a)(2), for acceptance of its late-filed amendment. Accordingly, Southwest's Petition for Leave to Amend will be granted and its associated amendment will be accepted. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

3. Southwest failed to provide a new site availability certification with its December 16, 1988 site change amendment. Accordingly, within 30 days of release of this Order, Southwest will be required to file a site certification with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

4. Southwest states that it is a limited partnership and certifies that no limited partner will be involved in any material respect in the management or operation of the proposed station. However, in response to Section II, Item 4, FCC Form 301 (October 1986), Southwest states that J. Lynn Stephens is the general partner and that she has 21% of the vote. These answers raise questions about Southwest's ownership structure. If Stephens is the sole general partner, then she must have 100% of the vote. If she is not, then the remaining general partners, their shares of the vote, and their media interests must be provided. Accordingly, within 30 days of release of this Order, Southwest will be required to file a clarifying amendment with the presiding Administrative Law Judge.

5. *Kight.* On June 3, 1988, prior to expiration of the amendment as of right period, Kight filed an amendment specifying a new transmitter site on Little Shell Island. On January 19, 1989, Kight petitioned for leave to amend its application. The petition was accompanied by an amendment specifying a new transmitter site on Pine Ridge Road. The accompanying amendment was filed after the last date for filing minor amendments as of right. In support of its request for acceptance of the late-filed amendment, Kight states that there had been a change in ownership of Little Shell Island and the new owners had indicated that they would not permit the use of the island as a transmitter site. On March 28, 1989, Kight states that the FAA advised it that the proposed construction would

exceed obstruction standards and that further aeronautical study was necessary to determine if the proposed site on Pine Ridge Road would be a hazard to air navigation; the FAA also stated that if the tower height was reduced from 331 to 175 feet above ground, the tower would not exceed obstruction standards. Kight further states that informal communications with the FAA indicated that further study of the proposed 331-foot tower would probably not result in a determination of no hazard to air navigation. At this point, Kight states that, rather than seek a further study from the FAA, it began the search for a new site that would satisfy FAA requirements. Kight states that after extensive negotiations with the new owners of Little Shell Island, it was able to obtain approval for use of the same transmitter site proposed in Kight's June 3, 1988 amendment. Kight states that a reasonable assurance letter confirming this understanding was issued on May 5, 1989, and that the FAA has previously issued a determination of no hazard for this site. Thus, on June 1, 1989, Kight again petitioned for leave to amend his application. Kight's petition for leave to amend was accompanied by an amendment withdrawing the site amendment filed on January 19, 1989, and reaffirming his intent to utilize the site on Little Shell Island specified in his June 3, 1988 amendment. The accompanying amendment was filed after the last date for filing minor amendments as of right. Kight contends that good cause exists for acceptance of its late-filed amendment. Kight states that upon the first indication from the FAA that a no hazard determination might not be forthcoming for its site on Pine Ridge Road, it immediately acquired reasonable assurance for another site, *i.e.*, the site on Little Shell Island that had been previously specified but for which reasonable assurance was withdrawn in December 1988. Kight thus contends that it acted with due diligence; that the amendment is not necessitated by its voluntary act; that acceptance of the amendment will not disrupt the orderly progress of the instant proceeding; that no other parties will be unduly prejudiced; and that Kight disavows any comparative advantage that may be gained by the amendment. We find that Kight has made the requisite good cause showing, pursuant to 47 C.F.R. § 73.3522(a)(2), for acceptance of its late-filed amendment. Accordingly, Kight's June 1, 1989 Petition for Leave to Amend will be granted and its associated amendment will be accepted. Further, Kight's January 19, 1989 Petition for Leave to Amend and its associated amendment will be dismissed. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

6. Mary Giglia Martinez Johnson is a general partner of Punta Ybel Communications, Ltd., an applicant for a new FM station at Sanibel, Florida (BPH-830714AM). This application was dismissed by the Administrative Law Judge in Dkt. 85-13 on July 10, 1985. The dismissal has been appealed and is pending before the United States Court of Appeals for the District of Columbia Circuit. This station is close enough in proximity to Punta Rassa that the combination of broadcasting interests could violate the Commission's duopoly rule. However, Johnson has indicated her intent to divest her interest in, and sever all connection with, Punta Ybel Communications, Ltd. Accordingly, in the event of grant of Kight's application, Johnson will be required to sever all connection with Punta Ybel Communications, Ltd. prior to the commencement of program test authority.

7. *Fulton.* Pursuant to 47 C.F.R. § 1.65, applicants are required to timely amend their applications so as to keep them substantially complete and accurate. Whenever information furnished in a pending application is no longer substantially complete and accurate in all significant aspects, or whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant is required to amend his application to furnish such information as may be appropriate within 30 days. The broadcast interests of Fulton's wife, Rebecca, are presumed to be attributable to him. *See Lady Sarah Jane McKinney - Smith*, 59 FCC 2d 398 (1976). Staff investigation reveals that Fulton failed to report: (1) the dismissal of his wife's applications for Marco, FL (BPH-850711OB) on January 19, 1989; Blackfoot, Idaho (BPH-850711MN) on June 11, 1987, for which a Petition for Reconsideration is pending; and Lafayette, Louisiana (BPH-860507OP) on May 24, 1988; and (2) the designation for hearing of his wife's application for East Ridge, Tennessee (BPH-870615MU) on March 11, 1988, Dkt. 88-122. Accordingly, Fulton will be required to file an amendment completely and accurately updating his application with respect to his wife's media interests as required by 47 C.F.R. § 1.65.

8. *Sunset.* On January 18, 1990, Sunset petitioned for leave to amend its application. The petition was accompanied by an amendment specifying a new transmitter site. The accompanying amendment was filed after the last date for filing minor amendments as of right. In support of its request for acceptance of the late-filed amendment, Sunset stated that it had been advised by the Federal Aviation Administration (FAA) that a "Determination of No Air Hazard" clearance could not be issued for its proposed transmitter site. Sunset has made the requisite good cause showing, pursuant to 47 C.F.R. § 73.3522(a)(2), for acceptance of its late-filed amendment. Accordingly, Sunset's Petition for Leave to Amend will be granted and its associated amendment will be accepted. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

9. *Patrick.* Information before the Commission indicates that Patrick was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403

Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

10. An identical three-fold issue was specified in each of the above proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolve the potentially disqualifying character issue. This unresolved character issue calls into question Patrick's qualification to be a Commission licensee. Therefore, since the issue remains unanswered, it will be specified and tried in this proceeding.

11. *Palm Tree*. Michelle L. Karas is employed by radio station WKZY-FM, La Belle, Florida, as a regional sales manager. This station is close enough in proximity to Punta Rassa that the combination of broadcasting interests could violate the Commission's cross-interest policy. However, Karas has indicated her intent to terminate her relationship with WKZY-FM in the event of grant of the referenced application. Accordingly, in the event of grant of Palm Tree's application, Karas will be required to sever all connections with WKZY-FM prior to the commencement of program test authority.

12. *EEO*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Abbott, Kight and Jim-Tan have filed such statements, they are deficient. Abbott has not listed either a specific female-oriented organization or a specific black-oriented organization for recruitment purposes even though U.S. Labor Department statistics list Punta Rassa in an area with a workforce that is 7.1% black. Kight and Jim-Tan also have not listed a specific black-oriented organization. Accordingly, Abbott, Kight and Jim-Tan will be Judge, or an appropriate issue will be specified by the Judge.

13. *Late - filed Amendments*. Intermart, Harvel, Fulton, Schefflera, Patrick, Jim-Tan and Palm Tree have petitioned for leave to amend their applications on the dates specified below. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Intermart	July 15, 1988; September 26, 1988; November 16, 1988; February 1, 1989; March 21, 1989; December 11, 1989; January 25, 1990
Harvel	August 5, 1988
Fulton	July 12, 1989; December 4, 1989
Schefflera	December 9, 1988; April 13, 1989; November 8, 1989
Patrick	November 15, 1988; November 16, 1988; December 12, 1988; December 22, 1988; December 28, 1988; January 9, 1989; January 13, 1989; June 27, 1989; June 30, 1989; August 2, 1989; September 13, 1989; November 3, 1989
Jim-Tan	November 7, 1988; December 28, 1988; December 15, 1989
Palm Tree	September 21, 1988, January 18, 1989

14. *Areas and Populations*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. *Air Hazard*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and applicants Harvel, Abbott, Patrick and Jim-Tan have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna supporting structure proposed by would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

16. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

17. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of Patrick.

2. To determine whether Patrick's organizational structure is a sham.

3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Patrick possesses the basic qualifications to be a licensee of the facilities sought herein.

4. To determine whether there is a reasonable possibility that the tower height and location proposed by Harvel, Abbott, Patrick and Jim Tan would constitute a hazard to air navigation.

5. To determine which of the proposals would, on a comparative basis, best serve the public interest.

6. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

18. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by Southwest on December 16, 1988 IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

19. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, Southwest shall submit a site certification amendment to the presiding Administrative Law Judge.

20. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, Southwest shall submit an amendment to the presiding Administrative Law Judge clarifying its ownership structure.

21. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by Kight on June 1, 1989 IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

22. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by Kight on January 19, 1989 and the corresponding amendment ARE DISMISSED.

23. IT IS FURTHER ORDERED, That, in the event of grant of Kight's application, Mary Giglia Martinez Johnson will be ordered to sever all connections with Punta Ybel Communications, Ltd. prior to the commencement of program test authority.

24. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Fulton will be required to submit an amendment completely and accurately updating his application as required by 47 C.F.R. § 1.65 to the presiding Administrative Law Judge.

25. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed by Sunset on January 18, 1990 IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

26. IT IS FURTHER ORDERED, That, in the event of grant of Palm Tree's application, Michelle L. Karas will be ordered to sever all connections with station WKZY-FM prior to the commencement of program test authority.

27. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Abbott, Kight and Jim-Tan shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

28. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Intermart, Harvel, Fulton, Schefflera, Patrick, Jim-Tan and Palm Tree ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

29. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

30. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

31. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

32. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-107

In re Applications of

H. L. CHARLES D/B/A FORD CITY BROADCASTING (hereafter "Ford") File No. BPH-880504MB

NICHOLAS HENDERSON D/B/A FORD CITY BROADCASTING COMPANY (hereafter "FCB") File No. BPH-880505OP

For Construction Permit
for a New FM Station on
Channel 271A (102.1 MHz)
in Ford City, California

HEARING DESIGNATION ORDER

Adopted: February 27, 1990; Released: March 19, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *FCB.* Section III, FCC Form 301, requires an applicant to certify that sufficient net liquid assets are on hand or sufficient funds are available to construct and operate the requested facility for three months without revenue. FCB's response to Section III indicates that it does not have the necessary funds. Accordingly, an appropriate issue will be specified.

3. FCB petitioned for leave to amend its application on June 6, and October 19, 1989. The accompanying amendment was filed after August 17, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

4. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Ford would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to FCB, whether the applicant is financially qualified.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Ford would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the petition for leave to amend filed by FCB IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-86

In re Applications of

CHANNEL 32 BROADCASTING COMPANY	File No. BPCT-861215KS
MID-CONTINENT COMMUNICATIONS, INC.	File No. BPCT-8612162K
KANSAS CITY SKYWAVE, INC.	File No. BPCT-861216K2
T.V. 32, INC.	File No. BPCT-861216K4
HOLT LIMITED PARTNERSHIP	File No. BPCT-861216K7
KANSAS CITY TELEVISION, LTD. (KZKC(TV))	File No. BPCT-861216K8

For Construction Permit
for a New Television Station
Kansas City, Missouri

Appearances

1. Timothy K. Brady on behalf of Channel 32 Broadcasting Company; John R. Wilner, Chase Libbey on behalf of Mid-Continent Communications, Inc.; Donald J. Evans, John M. Shoreman on behalf of Kansas City Skywave, Inc.; Gene A. Bechtel, Joseph W. Kennedy on behalf of T.V. 32, Inc.; Jerrold Miller on behalf of Holt Limited Partnership; and Tom W. Davidson, Margaret L. Tobey, Kurt Wimmer on behalf of Kansas City Television, Ltd. (KZKC(TV)).

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
JOSEPH P. GONZALEZ

Issued: March 14, 1990; Released: March 23, 1990

2. By *Hearing Designation Order* released in this proceeding on April 14, 1987, the above-referenced applications of Channel 32 Broadcasting Company (Channel 32), Mid-Continent Communications, Inc. (Mid-Continent), Kansas City Skywave, Inc, (Skywave), T.V. 32, Inc. (T.V. 32), Holt Limited Partnership (Holt), and Kansas City Television, Ltd. (KZKC) for a construction permit for a new television station in Kansas City, Missouri on Channel 32 were designated for hearing on the following issues:[1]

> (1) To determine, with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.
>
> (2) To determine, with respect to Mid-Continent Communications, Inc. and Channel 32, Inc., whether circumstances exist which warrant a waiver of Section 73.685(a) of the Commission's Rules.
>
> (3) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (4) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.[2]

The *Hearing Designation Order* further ordered that evidence with respect to the areas and populations which would fall within the predicted 64 dBu (Grade B) contour of each applicant, together with the availability of other television service of Grade B or greater intensity will be considered under the standard comparative issue, for the propose of determining whether a comparative preference should accrue to any one of the applicants.

3. The air hazard issue set forth in (1) above was resolved in favor of each of the applicants. *See Orders*, FCC 87M-3132, released December 3, 1987; FCC 87M-2115, released September 8, 1987; FCC 87M-1780, released July 27, 1987; FCC 87M-1779, released July 27, 1987; FCC 87-1778, released July 24, 1987; and FCC 87M-1777, released July 24, 1987. The site availability issue designated against Skywave by the Presiding Judge in the *Memorandum Opinion and Order*, FCC 87-2416, released on October 1, 1987, was resolved in Skywave's favor prior to the commencement of the first hearing session. *See Order* FCC 87M-3131, released December 3, 1987.

4. By *Order* FCC 87M-2402, released October 1, 1987, the Presiding Judge enlarged the scope of the Section 73.685(a) issue, set forth above, to include the applicant KZKC. By *Order* FCC 87M-2680, released October 27, 1987, the Presiding Judge placed both the burden of proceeding and the burden of proof with respect to this issue on Mid-Continent and KZKC. Channel 32 along with the remaining applicants, was granted a waiver of the requirements of Section 73.685(a) of the Commission's Rules. *See Orders*, FCC Nos. 87M-2444, released October 5, 1987; 87M-2310, released September 23, 1987; 87M-2314, released September 23, 1987; and 87M-2311, released September 23, 1987.

5. Prehearing conferences were held on June 16, 1987 and April 27, 1988. Hearing sessions were held in Washington, D.C. on December 8-11, 21-22, 28-29, 1987 and July 19-20, 1988. The record was closed on July 20, 1988 (Tr. 1927).

CITY COVERAGE ISSUE

Findings of Fact

6. Section 73.685(a) of the Commission's Rules provides, in pertinent part, as follows:

> (a) The transmitter location shall be chosen so that, on the basis of the effective radiated power and antenna height above average terrain employed, the following minimum field strength in decibels above one microvolt per meter (dBu) will be provided over the entire principal community to be served: (channels 14-69: 80 dBu).

7. As noted above, with the exception of Mid-Continent and KZKC, all of the applicants were granted waivers of the requirements of Section 73.685(a) of the Commission's Rules. The record demonstrates that Mid-Continent will serve 429,992 persons within its 80 dBu contour out of a total population within the city limits of Kansas City, based upon The 1980 United States Census, of 448,159 and 216 square miles out of a total city area of 309 square miles (MCC, Ex. #5, p. 8). Mid-Continent's 80 dBu contour, therefore, would fail to provide service to 18,167 persons residing within an area of 93 square miles (MCC, Ex. #5, p. 7), representing a total coverage of 96 percent of the population and 70 percent of the area of Kansas City, Missouri (MCC, Ex. #5, p. 8). Mid-Continent states that it seeks a waiver of the requirements of Section 73.685(a) so that it can broadcast from the existing FM transmitting tower of KCFX (FM) at Harrisonville, Missouri with an increase in the height of that tower to 1,033 feet or 314.9 meters above ground (Mid-Continent, Ex. #5, p. 1). KZKC's proposed 80 dBu contour will encompass a total population, based on The 1980 United States Census, of 432,691 persons in an area of 217 miles, leaving 15,468 persons in an area of 97 square miles with no city grade service, and reflecting a coverage of only 69.1 percent of the total area and 96.5 percent of the total population residing within the city limits of Kansas City (KZKC, Ex. #2, pp. 3-4, Table I).

8. Mid-Continent's principals discussed the possibility of amending their application to specify a new antenna site (Tr. 437-39). Mid-Continent's Robert Wheeler testified that they considered moving to other sites since they were aware that other applicants had selected sites that did require a waiver (Tr. 438-9). However, Mid-Continent's engineer, Alvin H. Andrus, recommended that they retain their site, and that Mid-Continent pursue a waiver of the city grade coverage rule (Tr. 438). Mid-Continent's Board of Director made the decision not to amend the application to specify a new antenna site (Tr. 438, 727). Mr. Andrus stated that the reasons for his recommendation not to move to one of the sites selected by the other applicants was his belief that they could not obtain FAA or local zoning approval for their proposals (Tr. 716). However, he indicated that he did not get in touch with the FAA regarding these other proposals (Tr. 716), and he did not contact an air hazard specialist to evaluate the situation (Tr. 750). Furthermore, he testified that he had no independent knowledge of the zoning classifications for the sites where the other towers will be located (Tr. 719, 742). With respect to Mid-Continent's proposal, Mr. Andrus states that he "assumed" that Mid-Continent's proposal would not require zoning action (Tr. 720), but admitted that he had no specific knowledge as to whether or not its proposal to increase the height of the existing tower above 1,000 feet would have any impact on zoning ordinances (Tr. 720).

9. The evidence of record clearly indicates that service to underserved areas to the south of Kansas City, Missouri was a definite factor in the Board's decision to remain at its proposed site. Mid-Continent's Directors believed that service to these underserved areas would make Mid-Continent's application unique and, therefore, place it in a favorable comparative position (Tr. 442); and that this aspect of its proposal would also make it more likely that its waiver request would be granted (Tr. 438-442). Mid-Continent's engineer admitted that he knew of no reason why Mid-Continent could not have amended its application to specify the site of one of the other applicants in this proceeding, each of which with the exception of KZKC obtained an FAA determination of no hazard to air navigation with respect to their individual proposal (Tr. 743).

10. KZKC proposes to top-mount its transmitting antenna on the existing tower of station KCFX(FM) Harrisonville, Missouri (KZKC, Ex. #2, p. 2). The KZKC tower presently has an overall height above ground level of 257 meters (843 feet) (KZKC, Ex.#2, p. 2). The KZKC's proposal would increase the height of the tower to 315 meters (1,033 feet). KZKC's expert witness, John A. Lundin, an engineer, testified that he believes that the KZKC's application is in substantial compliance with the intent of Section 73.685(a) of the Commission's Rules, and that a waiver of the requirements of that Section is fully justified (KZKC, Ex. #2, p. 6). He opined that locating at the KZKC's antenna site would permit efficient utilization of the channel in question since it would allow operation with the maximum permitted effective radiated power (ERP) and an effective antenna height (EAH) of 318 meters (1,043 feet), while at the same time avoiding the environmental and aeronautical hazard considerations that may be attendant with the construction of a new tower (KZKC, Ex. #2, p. 2). Mr. Lundin admitted, however, that there are other sites which would allow operation with maximum power and an effective antenna height of 318 meters (Tr. 1403); and that his environmental and aeronautical concerns were general in nature (Tr. 1403-04).

Conclusions of Law

11. There is no evidence of record that either Mid-Continent or KZKC sought alternative antenna sites. In fact, both were aware that the other applicants in this proceeding were able to propose sites which provide the required level of coverage to virtually all of the area and population of the City of Kansas City. This is clearly not a situation where there are no other suitable sites available to an applicant. Mid-Continent and KZKC both freely chose to pursue a waiver rather than amend to a new site. As a result, Mid-Continent will provide a city grade signal to only 96 percent of the population and 70 percent of the area of Kansas City. It will not provide such service to 18,167 persons (4 percent of the population) in an area of 93 square miles (30 percent of the area). KZKC will furnish a city grade signal to only 96.5 percent of the population and 69.1 percent of the geographical area of Kansas City. It will not provide such service to 15,468 persons (3.5 percent of the population) in an area of 97 square miles (30.9 percent of the area). As noted by the Bureau, these figures are not *de minimis*.

12. The Presiding Judge finds that Mid-Continent and KZKC have failed to establish any valid public interest or equity considerations for selecting their proposed sites or for granting a waiver of the Commission's city coverage rule. In fact, KZKC offered little explanation for selecting its site or for failing to amend to a site which would have given greater city grade coverage to Kansas City, Missouri. Mr. Lundin, who testified in support of KZKC's waiver request, did not prepare KZKC's original application and has no first hand knowledge of the factors involved in the selection of KZKC's antenna site (Tr. 1402). Mid-Continent and KZKC freely chose to remain at their respective antenna sites although they are not in substantial compliance with the requirements of Section 73.685(a) of the Rules, and they must suffer the consequences of that decision. The Presiding Judge concludes what Mid-Continent and KZKC have not met their burden of proof that it would be in the public interest to grant the waiver and have not established that such a waiver would not undermine the policy embodied in that Rule. *See Pappas Telecasting, Inc.* 52 RR 2d 1495, 1497-1498 (Rev. Bd. 1983). Accordingly, Mid-Continent and KZKC's requests for a waiver will be denied, and the Presiding Judge rules that both applicants are not technically qualified to become Commission licensees.

13. Although both Mid-Continent and KZKC have been disqualified, comparative findings of fact and conclusions of law with respect to these applicants will nevertheless be made in the event that they are later found by a reviewing body to be qualified and their applications reinstated.

CHANNEL 32 BROADCASTING COMPANY

Findings of Fact

14. Channel 32 is a general partnership organized under the laws of the State of Missouri. It has two partners, Donald R. Stimble, with a 50 percent equity interest and voting control, and Ronnie E. Lewis with a similar equity interest and degree of voting control (Channel 32, Ex. #I, p. 1).

Best Practicable Service

Donald R. Stimble

15. Mr. Stimble proposes to serve as Channel 32's full-time General Manager, devoting a minimum of 40 hours a week to his duties at the station (Channel 32, Ex. #2, p. 1). As General Manager, he will have responsibility for supervising all phases of the station's operations, and all management levels employees will report directly to him (Channel 32, Ex. #2, p. 1). Mr. Stimble, along with his general partner, Mr. Lewis, will oversee the continuing ascertainment of community needs and interests and will formulate programming responsive to meet these needs and interests. In addition, he will assure station compliance with all of the Commission's Rules and Regulations (Channel 32, Ex. #2, p. 1).

16. Mr. Stimble has been a resident of Kimberling City, Missouri, a community located about 250 miles from Kansas City, Missouri, for about five (5) years (Tr. 56). He testified that he will relocate to Kansas City, Missouri in the event that Channel 32 is the successful applicant (Channel 32, Ex. #2, p. 2). Stimble has never lived in Kansas City (Tr. 74) and he has not been involved in any civic activities in that community.

Ronnie E. Lewis

17. Mr. Lewis proposes to serve as the station's full-time General Sales Manager, devoting a minimum of forty (40) hours a week to his duties at the station (Channel 32, Ex. #3, p. 1). As General Sales Manager, Mr. Lewis will be responsible for supervising the station's sales department, including all sales department employees, all of whom will report directly to him. Mr. Lewis will also be in charge of overseeing the formulation and implementation of Channel 32's Equal Employment Opportunity Program (Channel 32, Ex. #3, 1).

18. Mr. Lewis is Black and is a native and life long resident of Kansas City, Missouri (Channel 32, Ex. #3, p. 1). He will continue to reside in that city if Channel 32 is the successful applicant. Mr. Lewis founded and participated in a P.U.T. ("Pick Up Truant") Program for the local schools, and he participated in an advisory capacity on several committees of, as well as assisted in fund raising for the Ad Hoc Committee Against Crime in Kansas City, Missouri. Since 1985, he has done volunteer work with the ALS (Lou Gehring's Disease) Society. In addition, he has worked as a volunteer counselor for the Kansas City Youth for Christ at their ranch for "troubled teens" in Kansas City. While employed with the Federal Housing Authority of Kansas City as a security officer, he developed and volunteered time to a program for low income youth which sponsored social events and motivating appearances by professional athletes. He also participated on a voluntary basis in several seminars designed to teach public school nurses about drugs and drug problems. Mr. Lewis is a member of Victory Temple Church and has been and continues to be involved in its activities in such capacities as youth director, Sunday school teacher, usher and soloist (Channel 32, Ex. #3, pp. 4-5).

19. Mr. Lewis, while still in high school, participated in an apprentice program at KUDL-AM/FM, Kansas City, Missouri, during which time he developed and produced a public affairs program. He was subsequently employed by KWKI (FM), Kansas City, Missouri as an account executive and then as a sales manager. He was also the primary community relations representative for the station. During the same period of time, Mr. Lewis produced a public affairs program as well as interviews with various persons concerning issues of public interest and importance. Mr. Lewis then served as an account executive in the sales department at station KCNW (AM) Kansas City, Missouri, followed by a sales position at station KBSM(AM), Blue Springs, Missouri (Channel 32, Ex. #3, pp. 2-3). His last period of employment or association with a broadcast entity was in 1984 or 1985 (Tr. 156).

Diversification of Ownership of Media

20. Channel 32, as a legal entity, has no ownership interest in any broadcast facility or any other medium of mass communications (Channel 32, Ex. #1, p. 1).

21. Donald R. Stimble is a 80 percent limited partner in Castle Rock Communications, Ltd., which presently holds a 5 percent equity interest in Christal Communications Corporation, permittee of Channel 53, Castle Rock, Colorado. On February 9, 1987, Christal Communications Corporation filed an application with the Commission to assign its permit to Le Sea Broadcasting Corporation. Mr. Stimble also holds a 20 percent interest in TeleMedia, Inc., which has the following LPTV construction permits outstanding: Channel 26, Poplar Bluff, Missouri, and Channel 48, Poplar Bluff, Missouri. In the event that

Channel 32's application is granted, Mr. Stimble will divest himself of any interest in Channel 53, Castle Rock, Colorado as well as his 20 percent interest in TeleMedia, Inc. (Channel 32, Ex. #2, p. 5).

22. Donald R. Stimble and his wife jointly own 100 percent of the stock of Garnett Publishing, Inc., the publisher of the weeklies *Garnett Review* and the *Anderson Countain* in Garnett, Kansas. Mr. and Mrs. Stimble will divest all interest in and connection with Garnett Publishing, Inc. and the two weekly newspapers in the event Channel 32's application is granted (Channel 32, Ex. #2, p. 5).

23. Ronnie E. Lewis has no interest in or connection with any broadcast station or any other medium of mass communications (Channel 32, Ex. #3, p. 5).

Conclusions of Law

Best Practicable Service

24. Although Mr. Stimble described himself as in semi-retirement (Tr. 57-58), he nevertheless has been devoting approximately 25 hours a week to a publishing enterprise, Garnett Publishing, Inc. and approximately 25 hours a week to his duties as Rector of St. Luke's Anglican Church in Springfield, Missouri (Tr. 60, 63). He has indicated that he will divest himself of his interest in and connection with Garnett Publishing, Inc. and terminate his position as Rector of St. Luke's in order to meet his commitment to Channel 32's proposed station (Channel 32, Ex. #2, p. 2; Tr. 60, 65). His stated intention to remain active in the Anglican Faith, after assuming his duties at the station, as well as to maintain an interest in the print media, in no way refutes his integration commitment. The evidence of record clearly demonstrates that he views any future involvement in these activities to be secondary to meeting his forty hours a week commitment to the proposed broadcast facility in Kansas City, Missouri. His answer in the affirmative to a speculative question posed by opposing counsel that he would be willing to "work 30 to 35 hours a week, if that is what it took to get the job done?" (Tr. 107) does not indicate that his duties at the station will require only 30 to 35 hours a week but, merely, that he would be willing to spend that amount of time on those duties. Mr. Stimble has made it clear, in earlier testimony, that he considered his forty-hour a week commitment to be a conservative estimate (Tr. 106). The Presiding Judge concludes, therefore, that there is nothing in the record which calls into question the genuineness or permanence of Mr. Stimbles's commitment to devote 40 hours of work to his duties at the station.

25. Similarly, there is no evidence of record that raises doubt as to sincerity of Mr. Stimble's intention to move from Kimberling, Missouri to Kansas City, Missouri in the event that Channel 32 is the successful applicant. The claim that it is unrealistic on its face to conclude that Mr. Stimble would be willing to give up his life style of five years at Kimberling, Missouri to move to Kansas City, Missouri is based on pure speculation and surmise without any reference to the evidence of record to support this claim.

26. Mr. Stimble has no prior broadcast experience which would entitle his quantitative integration credit of 50 percent to further qualitative enhancement. Furthermore, he has engaged in no civic activities particular to the Kansas City, Missouri, area and he does not claim minority status. His integration credit, therefore, is qualitatively enhanced solely by his announced intention to move to Kansas City, Missouri in the event that Channel 32 is the successful applicant.

27. Mr. Lewis plans to disband his companies, Love Productions and Contemporary Christian Concerts in the event that Channel 32 receives the permit (Tr. 127-128). He will, however, continue to perform preaching engagements on the weekend as well as make local and out-of-town television appearances (Tr. 124-125, 133, 160). Mr. Lewis estimates that he will devote approximately 15 hours a week to these outside activities (Tr. 129). The amount of time which he projects will be spent on these activities when added to his forty-hour a week commitment to Channel 32's proposed station does not, in the opinion of the Presiding Judge, add up to a total figure which would impede his ability to meet his commitment to the proposed broadcast facility. In any event, Mr. Lewis has made it clear that he will limit his involvement in these other areas to the degree that they would conflict with his forty-hour a week integration commitment (Channel 32, Ex. #3, p. 4).

28. Mr. Lewis, a life-long resident of Kansas City, has had a limited involvement in the civic affairs of that community. During the last four years, he has been involved only with the ALS Society and the Victory Temple Church (Channel 32, Ex. #3, p. 4; Tr. 134-35). In the past, he has participated to a limited degree in other civic activities in the Kansas City, Missouri area. Accordingly, his quantitative integration credit of 50 percent is entitled to qualitative enhancement because of Mr. Lewis' minority status, and his life long residence within the city limits of the community of license with a slight involvement in the civic affairs of that community. Mr. Lewis has no prior broadcast experience which would entitle his quantitative integration credit to further enhancement.

Diversification

29. Donald R. Stimble has stated that he will divest himself of all of his interests and associations with media of mass communications. He, therefore, has no chargeable media interests. Channel 32 and Mr. Lewis hold no interest in or association with any medium of mass communications. Accordingly, Channel 32 is not subject to any diversification demerit.

MID-CONTINENT COMMUNICATIONS INC.

Findings of Fact

30. Mid-Continent, a Missouri corporation, is authorized to issue both voting and non-voting stock (Mid-Continent, Ex. #I, p. 1). Robert R. Wheeler has a 14.3 percent equity interest and serves as President and as a Director. Everett P. O'Neal holds a 14.3 percent equity interest and is Vice President in addition to being a Director. Herman A. Johnson has a 14.3 percent equity interest and serves as Secretary-Treasurer as well as Director. Messrs. Wheeler, O'Neal and Johnson each hold 33.33 percent of Mid-Continent's voting stock (Mid-Continent, Ex. #I, p. 2).

31. The non-voting shareholders of Mid-Continent are G. L. Blankinship, Jr., Ollie H. Gates, James R. Roath and Wayne C. Sellers. Each one of these individuals has a 14.3 percent equity interest in the applicant (Mid-Continent, Ex. #I, p. 1).

Robert R. Wheeler

32. Dr. Wheeler, a Black American, will be the full-time General Manager of Mid-Continent's station. He will direct the overall operations of the proposed station, and he will have primary responsibility for all decisions affecting the station's day-to-day and long-range operations. Dr. Wheeler will also implement and administer the station's Equal Employment Opportunity Program. With the exception of the years between 1972 and 1977, Dr. Wheeler has been a resident of Kansas City, Missouri since 1926 to the present, and he will continue to reside in Kansas City, Missouri in the event that Mid-Continent is the successful applicant (Mid-Continent, Ex. #2, p. 1). Dr. Wheeler presently serves on the Board of Trustees for the Midwest Research Institute, a non-profit organization engaged primarily in solar energy research (Mid-Continent, Ex. #2, p. 3; Tr. 311-312). He is also co-Chairman of the Civic Council's Coalition for Community Partnerships, a subcommittee formed to consider the needs of the Kansas City Black Community and explore methods of expanding opportunities for members of that minority group (Mid-Continent, Ex. #2, p. 2). Dr. Wheeler is also on the Executive Board of the Kansas City NAACP Chapter, and he is also currently a member of the Advisory Committee of the Bruce Watkins Memorial Foundation (Mid-Continent, Ex. #2, 2). During the 1980's, Dr. Wheeler served on the Board of Directors of the Kansas City Crime Commission and has been a member of Sister Cities International and the Mayor's Corps of Progress (Mid-Continent, Ex. #2, p. 3). He also served, during the 1970's, on the Board of the Greater Kansas City Community Foundation, the Kansas City Council of the Boy Scouts of America, the Heart of America United Way, the Kansas City Museum, the Salvation Army and Avila College (Mid-Continent, Ex. #2, p. 4). He was also a member of the Chamber of Commerce, the Civic Council of Greater Kansas City, the Board of Science Pioneers, the Hallmark Scholarship Selection Committee, and the Missouri State Department of Education School Finance Study Committee (Mid-Continent, Ex. #2, p. 4).

Everett P. O'Neal

33. Mr. O'Neal is a Black American. He will be the full-time General Sales Manager of Mid-Continent's proposed station (Mid-Continent, Ex. #3, 1), and he will have responsibility for hiring the station's sales staff and for supervising and directing its sales efforts (Mid-Continent, Ex. #3, p. 1; Tr. 550).

34. Mr. O'Neal has been a resident of Kansas City, Missouri since 1920, and he will continue to reside there while working at Mid-Continent's proposed station (Mid-Continent, Ex. #3, p. 1). He is presently a member of the following Kansas City organizations: Kansas City Missouri Board of Election Commissioners; Board Member (Vice President) of the United Way of Kansas City; Board Member of Minority Suppliers Development Council; Member Vestry St. Augustine's Episcopal Church; Board Member (President of the Quarter Century Club) Urban League of Kansas City; Civic Council of Greater Kansas City; Midwestern's Club of Greater Kansas City; Board Member of Kansas City Corporation for Industrial Development; Board Member of KCAEDC (Area Development); Board Member of St. Luke's Hospital; and the Mayor's Prayer Breakfast (Mid-Continent, Ex. #3, pp. 2-3). He formerly participated in the following Kansas City organizations during the periods and in the capacities shown: Citizens Association, Executive Committee Director, between 1938-1985; Concentrated Employment Program, Board Chairman, between 1981-1986; Inner-City Foundation, Board Member, between 1979-1981; Private Industry Council of Kansas City, Chairman, between 1981-1985; City Planning Commission of Kansas City, Commissioner, between 1963-1971; Chamber of Commerce of Greater Kansas City, Vice President, between 1972-1976; Linwood YMCA, Board Chairman, between 1965-1971; National Urban League, Trustee, between 1973-1976; Episcopal Church Diocese, Board Member, between 1972-1977; American Humanic Foundation, trustee, between 1969-1973; Key Men's Council, Board Member, between 1970 and 1976; Interracial Council for Business Opportunity, Board Member, between 1973-1976; National Alliance of Businessmen, Metro Chairman, between 1975-1977; and the Study of Children's Agency Needs and Services, Committee Member, between 1961-1963. In addition, Mr. O'Neal has received five awards for his civic involvement from organizations in the Kansas City, Missouri area (Mid-Continent, Ex. #3, pp. 3-4).

35. Mr. O'Neal has no prior broadcast experience.

Herman A. Johnson

36. Mr. Johnson, a Black American, will serve as the full-time Business Manager of Mid-Continent's station (Mid-Continent, Ex. #4, p. 1; Tr. 595-96). In this role, he will supervise the station's financial affairs, including its budget preparations and its accounting and billing practices (Mid-Continent, Ex. #4, p. 1; Tr. 592). He will also be involved in employee benefit matters (Tr. 613).

37. Mr. Johnson has been a resident of Kansas City since 1959, and he will continue to reside there while working at the proposed station (Mid-Continent, Ex. #4, p. 1). He currently participates in the following Kansas City area organizations: NAACP; Chamber of Commerce of Greater Kansas City serving as Vice Chairman, Board Member, and Executive Committee Member of the Community Services Division and as Vice Chairman of Minority Business; Land Trust, Jackson County, Missouri, Trustee; Civic Council of Greater Kansas City, Director; Heart of America United Way, Board of Directors; NAACP Legal Defense and Education Fund, Board Member; Rockhurst College, Chairman, Board of Regents; American Red Cross, Board of Directors, Executive Committee; University of Kansas City, Board of Trustees and Executive Committee; and Center for Business Innovation, Inc., Director. In the past, he has participated in the following Kansas City organizations during the periods and in the capacities indicated below: Heart of America United Way, United Community Service, Member between 1967 and 1980; Heart of America United Way, Transition Committee, Member between 1979 and 1980; Heart of American United Way Search Committee for New President, Chairman between 1980 and 1981; Board of Election Commissioners of Kansas City, between 1981 and 1985; University of Kansas City Committee on Evaluation of Top Administrators, between 1984-1985; Rockhurst College, Campus Development Committee, Member between 1978-1984; Kiwanis Club, Public Service

Committee, Chairman between 1983-1986; College of Public and Community Services, University of Missouri, Columbia, Missouri, Advisory Council Member between 1976-1985; Transportation Department of the Chamber of Commerce, Vice Chairman between 1980-1982; Small Business Department of the Chamber of Commerce, Vice-Chairman between 1982-1984; Board of Family and Children's Services, Kansas City, Missouri, Member between 1978-1984; Heart of America United Way Allocation and Budget Review, Section Member between 1974 and 1979; United Community Services, Treasurer between 1972 and 1979; Missouri Association for Social Welfare, State President between 1975-1977; Kansas City Commission on Human Relations, Vice-Chairman between 1960 and 1969; Public Accommodations Committee, Member, between 1964-1969; Committee of Thirty, Kansas City School District, Member, between 1967-1968 (Mid-Continent, Ex. #4, pp. 2-5).

38. Mr. Johnson has no prior broadcast experience.

Diversification

39. Mid-Continent does not have any interests in any medium of mass communications (Mid-Continent, Ex. #1, p. 2). Dr. Wheeler, however, is a 4.88 percent stockholder in Cable Television of Kansas City, Inc., a Missouri corporation which holds a right, not executed to date, to lease a cable channel on the Kansas City area cable system (Mid-Continent, Ex. #1, p. 2). Dr. Wheeler has made a commitment to divest himself fully of this interest in the event Mid-Continent's application is granted, and he proposes to return the stock to the company if no buyer for the stock can be found (Mid-Continent, Ex. #1, p. 2; Tr. 419). None of Mid-Continent's non-voting shareholders has any attributable interests in any medium of mass communications (Mid-Continent, Ex. #13).

Conclusions of Law

Best Practicable Service

40. Mid-Continent proposes to integrate its voting shareholders Messrs. Wheeler, O'Neal and Johnson into the affairs of its proposed station on a full-time basis. In view of this proposal, it claims a 100 percent full-time quantitative integration credit. The record demonstrates, however, that although the corporation has both voting and non-voting shareholders, all of the principals of the corporation have been actively involved in the prosecution of Mid-Continent's application; and that Mid-Continent has always operated as a group of seven, both before and after the application was filed, with the non-voting shareholders heavily involved in the company's decision making. Mid-Continent's decision to designate certain principals as voting shareholders and others as non-voting does not, therefore, reflect the reality of Mid-Continent's corporate structure, but constitutes, rather, an attempt on its part to gain maximum comparative advantage by claiming that only the integrated principals will have control of the corporation.

41. The evidence of record demonstrates that Dr. Wheeler has played a dominant role in Mid-Continent's affairs. He is the founder of the Channel 32 project as well as the individual who recruited all of the other investors. He also serves as the company's President and, at one time, was the company's sole Director. In addition, Dr. Wheeler is Mid-Continent's principal liaison person with both corporate and FCC counsel, its proposed General Manager, as well as author of all reports issued to the shareholders. Conceding, however, this dominant position in Mid-Continent's affairs to Dr. Wheeler does not preclude the finding that Mid-Continent's non-voting shareholders' activities on behalf of the applicant contradict their claim that they are solely passive investors.

42. The Articles of Incorporation as well as Mid-Continent's By-Laws contain no provision or language restricting the participation of non-voting shareholders in the affairs of the corporation (Tr. 269-70). In a memorandum dated March 18, 1987, Dr. Wheeler indicates that Mr. Johnson is to contact Mr. Sellers, a non-voting shareholder, regarding the filing of the corporation's tax reports (Channel 32, Ex. #9). Mr. Sellers' accounting firm is also doing Mid-Continent's tax work (Tr. 299), although Mr. Johnson actually filed Mid-Continent's tax return (Tr. 299). The notes of a meeting held on April 24, 1987, prepared by Dr. Wheeler, indicate that the meeting was attended by all principals of Mid-Continent, except for Mr. Johnson (Channel 32, Ex. #10) (Tr. 300). The notes also reflect that it was agreed that Mr. Blankinship, another non-voting shareholder, would contact Mr. Gates, still another non-voting shareholder, and that the two of them would prepare guidelines to be submitted to the group with regard to the possibility of undertaking additional investment activity (Channel 32, Ex. #10); and that other business opportunities were discussed at that meeting (Tr. 302). An earlier Mid-Continent meeting was held on January 8, 1987, at Mr. Gates' office, at which other non-voting shareholders may have been present (Tr. 308-309). Dr. Wheeler acknowledged that on other occasions meetings have been held at the offices of non-voting shareholders (Tr. 309).

43. Dr. Wheeler also testified that he interacted with other principals, both voting and non-voting, fairly frequently trying to keep them as well informed as possible while trying to determine their opinions about various matters (Tr. 350, 352, 369). He also indicated that on occasion he circulated memoranda, including those dated March 18, 1987, May 14, 1987 and November 15, 1987 and made telephone calls for the purpose of providing Mid-Continent's principals, including non-voting shareholders, with information as to important developments as they occurred (Tr. 369, 371), and with the opportunity to react to these developments as well as make suggestions for the benefit of the corporation (Tr. 352-355, 361, 363, 374; Channel 32, Ex. #9). At times they responded and, according to Dr. Wheeler, at other times they did not (Tr. 370-371). He testified, however, that none of the principals was hesitant about contacting him (Tr. 355).

44. The conclusion is inescapable that Mid-Continent's two-tiered ownership structure was designed solely for maximum comparative benefit, and that it does not represent how the business of the corporation has been conducted in the past or how it is likely to be conducted in the future. In a number of instances, corporate meetings of Mid-Continent have included the voting as well as non-voting shareholders who have, in fact, been expected to take an active role in company discussions and in the conduct of Mid-Continent's business (Tr. 341, 343, 344, 347, 352, 353). At least one meeting was held in the offices of a non-voting shareholder for the purpose of determing whether they should change communications counsel (Tr. 367). At other meetings certain non-voting shareholders were assigned specific tasks in the further-

ance of the corporation's business and, apparently, will be expected to perform other tasks in the future. Mr. O'Neal, for example, indicated specifically that he will seek the advice of Mr. Blankinship in the area of sales, a field in which, he believes, Mr. Blankinship has a great deal of experience (Tr. 566). The Presiding Judge concludes, therefore, that at the very most Mid-Continent would be entitled to a quantitative integration credit of 42.9 percent, representing the equity interest of the three principals proposed to be integrated into the affairs of its station.

45. There is no evidence of record which casts any doubt on Dr. Wheeler's integration commitment to the station or on his ability to meet that commitment. Although he has been retired since June 1987 (Tr. 312, 393), he has shown by being the principal force behind this application that he is committed to this endeavor which factor lends credibility to his integration pledge (Tr. 313-322).

46. Mr. O'Neal has been in what he described as "semi-retirement" since selling several businesses (Tr. 547). However, he still spends approximately an hour to an hour and a half a week on his present business, O'Neal Investments (Tr. 548) which, he indicated, is involved in mostly passive investments, with the exception of his personal activities in developing a convenience store in Kansas City, Missouri (Tr. 548). Although he will pursue the possibility of opening additional stores of that type, he does not envision having to spend any additional time on these projects since he has two sons in the business as well as a manager and an assistant manager (Tr. 548). Mr. O'Neal also presently spends three months out of the year at a vacation home in the Ozark Mountains (Tr. 546-547). Although he would have to abandon those prolonged stays to meet his integration commitment, he has not discussed this fact with his wife (Tr. 572).

47. Mr. Johnson testified that he will curtail his activities with his privately owned company in the event that Mid-Continent receives the permit by "probably" selling his insurance business and by having some one else run the real estate end of the business (Tr. 594-595). He would, however, retain his real estate broker's license, even if he curtails his activities in this field (Tr. 611).

48. Mr. O'Neal's limited participation in prosecuting this application and his semi-retired status raise serious doubts as to whether this individual will fulfill his integration pledge to this Commission. The record reveals little or no participation on his part in the prosecution of this application. As of the date of the hearing, Mr. O'Neal was 77 years of age (Tr. 563). Although advanced age would not necessarily rule out an ability to meet a forty hour a week integration commitment, in Mr. O'Neal's case, he is already and has been for sometime in semi-retirement. It is simply not credible to believe that he is now prepared several years after to resume full-time employment. Mr. Johnson, however, who was 71 as of the date of the hearing, remains professionally active, devoting 40 hours a week to operating his own real estate and insurance business (Tr. 594). He has indicated a willingness to curtail these activities in order to meet his commitment to the Kansas City broadcast facility, and there is nothing in the record to refute this claim. The Presiding Judge concludes, therefore, that Mid-Continent is entitled to a quantitative integration credit in an amount that reflects only the equity interests of Messrs. Wheeler and Johnson.

49. Dr. Wheeler's quantitative integration credit is qualitatively enhanced by his status as a Black-American, his long-term residence in the Kansas City area and his significant involvement in the civic affairs of that community. Mr. Johnson is also a Black-American and a long-term resident of Kansas City also with significant civic involvement. Neither Dr. Wheeler nor Mr. Johnson have any prior broadcast experience.

Diversification

50. Dr. Wheeler has made a timely commitment to divest himself of his 4.88 percent interest in a leased CATV Channel. Mid-Continent and its other principals have no media interests. Accordingly, Mid-Continent is not charged with any demerit under the diversification criterion.

KANSAS CITY SKYWAVE, INC.

Findings of Fact

51. KCS is an Indiana corporation with two classes of stock, common voting and non-voting preferred. Brenda Williams was the President of the corporation[3] and Linda Cooper is the Secretary/Treasurer. Both served as Directors. Ms. Williams held 51 percent of the voting stock and 10.2 percent of the equity and Ms. Cooper the remaining 49 percent or 9.8 percent of the equity. Skywave Communications Corp. (SCC) holds 80 percent of the equity (Skywave, Ex. #1, p. 1).

52. Ms. Williams was initially issued 11 shares of voting stock and Ms. Cooper 9 shares (Tr. 1025; T.V. 32, Ex. #6). Ms. Williams paid $510 for her share of the stock and Ms. Cooper paid $490 (Tr. 1070, 1181). Both women testified, however, that they intended to issue the stock in 51/49 proportions but had mistakenly miscalculated the amount of the stock to be issued (Tr. 1026, 1131, 1178). According to their testimony, Ms. Williams and Ms. Cooper noticed the mistake in the number of shares issued in October 1987, and they issued themselves an additional 40 shares of stock in order to bring their number of shares up to the proportions which were originally intended (Tr. 1068). The KCS application reflects that Ms. Williams owns 51 percent and Ms. Cooper 49 percent of the voting stock (Tr. 1069, 1138-9). SCC has always held 80 shares of preferred stock (T.V. 32, Ex. #6; Tr. 1048), although the KCS application incorrectly indicates that SCC has 1,000 shares of preferred stock (Tr. 1048-049). At the time that Ms. Williams and Ms. Cooper were issued the 40 additional shares of stock, SCC was issued a subscription agreement permitting it to buy an additional 320 shares of preferred stock so as to maintain the originally agreed upon proportions (Tr. 1070-71).

Best Practicable Service

Brenda Williams

53. Ms. Williams, a Black female, proposed to work full-time (not less than 40 hours a week) as the station's General Manager. In that position, she would have had general responsibility for the oversight of all the station's affairs, including sales, personnel, administration, programming, and technical affairs. She would also have been involved in the development, acquisition and sched-

uling of programming, and she planned to work closely with Ms. Cooper in establishing station policy and developing programming priorities (KCS, Ex. #2, p. 1).

54. Ms. Williams lived from June 1977 until her death in Kansas City, Missouri or at an address within the Grade B contour of the proposed station (KCS, Ex. #2, p. 1). Her plan was to continue to reside in Kansas City, Missouri. Ms. Williams served as a Director and Vice President of the Kansas City CORO Foundation, a chapter of a national foundation that trains adults and college students to be leaders in public affairs. She was also a Board Member of the Mid-Continent Council of Girl Scouts as well as consultant to the Leadership Institute and a former troop leader at St. James-Paseo United Methodist Church. Ms. Williams was a member of the St. James-Paseo United Methodist Church and between 1984-1986, she was an active member of the Kansas City Press Club, serving on the Club's Scholarship and Minority Affairs Committees as well as chairing a seminar for minority high school students on journalism. She was also a Member of the Board of Directors of the Crittenton Center from 1983 to 1985 (KCS, Ex. #2, pp. 2-3).

55. Ms. Williams had been in broadcasting since 1969. She began her career as a newscaster at KATZ Radio in St. Louis, Missouri. In 1973, she became general assignment reporter, talk show host and producer for KPLR-TV, St. Louis, Missouri, and then moved to KSD-TV and Radio in St. Louis, Missouri, a year later, where she had similar responsibilities until 1977. She became in that year the weekend anchor/government reporter for KMBC-TV in Kansas City, Missouri. Thereafter from 1981 to 1985, she worked as the weekly co-anchor/reporter for KMBC. She also worked part-time at KSD television as assistant to a public affairs program host and producer for a number of months (Tr. 1103). Her final period of employment was time spent as a self-employed media consultant to station KCUR under a contract that expired on December 10, 1987 and was not to be renewed. Ms. Williams proposed to terminate all other employment upon assumption of her duties as General Manager of the Kansas City Skywave station (KCS, Ex. #2, p. 2).

Linda Cooper

56. Ms. Cooper, a Black female, will work full-time, not less than 40 hours a week, as the proposed station's Station Manager. She intended to serve directly under Brenda Williams' supervision with her primary responsibility the business and administrative affairs of the station. The station's Sales Manager will report directly to her, and Ms. Cooper will have immediate responsibility for staffing and personnel practices including EEO complaints. Ms. Cooper will also be responsible for community relations and the ascertainment of community needs. Ms. Cooper proposed to work with Ms. Williams in establishing station policies and developing programming priorities (KCS, Ex. #3, p. 1).

57. Ms. Cooper has resided continuously in Kansas City, Missouri since 1977, and she will continue to do so if KCS is the successful applicant (KCS, Ex. #3, p. 1). She is Chair of the Kansas City Black Economic Union Board of Trustees, a group which provides support to small minority businesses in economically disadvantaged areas of Kansas City. She is also a member of the Board of Directors of the Kansas City Black Chamber of Commerce; a member of the Communications, Marketing and Fundraising Committee of the Heart of America United Way; a member of the Board of Directors of the Linwood YMCA; a member of the Central Exchange, a women's networking group in Kansas City; a member of the Greater Kansas City Chapter of Links, a group which supports community activities; and a member of the Alpha Kappa Alpha Sorority (KCS, Ex. #3, p. 2). She is also a member of the following national civic organizations: the NAACP's Industry Advisory Committee on Women in the Services, the National Association of Market Developers and the National Black MBA Association (KCS, Ex. #3, p. 2).

Diversification

58. Neither KCS nor any of its voting or non-voting principals own any interest in any existing medium of mass communications, nor does any principal of KCS's non-voting shareholder own any voting interest in any medium of mass communications. Brenda Williams had a consulting arrangement with an FM station in Kansas City, Missouri which terminated on December 10, 1987 (KCS, Ex. #4).

Conclusions of Law

Best Practicable Service

59. Skyway's Articles of Incorporation provide for preemptive rights to acquire any newly issued shares so that all shareholders can maintain their ownership's percentages. A majority of each class of stock, voted within the respective classes must approve the price at which any stock shares are issued. Similar majorities must approve any changes in the current by-laws. The Articles further provide that the non-voting shareholder may put its stock to the corporation at fair market value after July 1, 1991. If the corporation chooses not to purchase the stock, it may then be converted to common stock at the option of the holder (T.V. 32, Ex. #5). If such an event occurs, SCC would hold 80 percent of the voting stock.

60. Ms. Williams indicated at the hearing that if the stock were "put" to the corporation, it was her intention to direct the corporation to purchase the stock. She admitted, however, that her ability to do this would be dependent on her and Ms. Cooper's financial circumstances at the time and that a significant amount of money would be required to do so (Tr. 1189-91, 1141). Although she agreed that the purchase price for the stock would be based on the fair market value of television stations in the Kansas City area (Tr. 1089-90), she acknowledged that she did not have a clear grasp of the value of television stations in that area (Tr. 1089-90). Ms. Williams and Ms. Cooper's total financial commitment to the enterprise to date has not exceeded $1,000.00.

61. There is no evidence that the non-voting shares will not be converted. Rather, a very strong presumption is raised that Ms. Cooper, who is now the sole voting shareholder, will not be able to purchase the shares in little more than a year. The conclusion is, therefore, inescapable that she will not be in a position to buy these shares, and that the non-voting shareholder on July 1, 1991, will be able to convert its shares to voting stock, thereby reducing the current voting shareholder to a minority, 10 percent voting interest. *See Signal Ministries, Inc.* 104 F.C.C. 2d 1482, 1490 (Rev. Bd. 1986). Therefore, the 80 percent equity interest of SCC, the present non-voting shareholder, must be treated as a active interest in

the entity. Ms. Cooper is thereby rendered a minority non-voting shareholder with little or no ability to manage the proposed station or to participate in policy making for the station.

62. The evidence of record further demonstrates that SCC has been the driving force behind the application. All of the major decisions with respect to this application were made by SCC principals, most of which occurred before Ms. Williams and Ms. Cooper joined the enterprise. Ms. Williams and Ms. Cooper were presented with a package involving a 20/80 percent equity split by SCC, and they agreed to serve as voting shareholders. SCC selected the lending institution (Tr. 1027,1179), and received firm commitments for all the necessary financing (Tr. 1184). The incorporation of Skywave (Tr. 1086), the selection of the State of its incorporation (Tr. 1023) as well as its principal place of business, resident agent and the engineering firm were all performed by an SCC principal (Tr. 1029-1030, 1040). Although Ms. Williams did have a telephone conversation with the owner of Skywave's proposed antenna site, the site owner had already agreed to make the property available and had sent a letter to that effect to another principal of SCC (Tr. 1039, 1051; T.V. 32, Ex. #8). Selection of corporate counsel as well as communications counsel was also made without any input from Ms. Williams or Ms. Cooper. Neither Ms. Cooper nor Ms. Williams were involved in the preparation of Skywave's corporate documents or in any meaningful way in the preparation of the application for filing with this Commission (Tr. 1129, 1044-45). They were also not involved in developing a business plan or budget for Skywave's Kansas City project (Tr. 1081). The only significant role played by either Ms. Williams or Ms. Cooper was the writing of checks for the corporation by Ms. Williams. The record fails to disclose any involvement on the part of Mr. Cooper. Furthermore, neither Skywave's Articles of Incorporation or its By-Laws contain any specific provisions limiting the activities of the corporation's non-voting shareholder (T.V. 32, Ex. #5, 7 and 11), and Ms. Williams was unaware of the existence of any other documents which impose restraints on the activities of the non-voting preferred shareholder (Tr. 1099).

63. Ms. Cooper will be integrated into the station on a full-time basis, working forty hours a week. Although she proposes to serve as the station's Station Manager, the Presiding Judge finds it extremely doubtful that she will serve in that position in view of her projected minority voting status and her failure to assume an active role in the prosecution of this application. Similarly, it is very questionable, if Ms. Williams had lived, that she would have served as General Manager or would have had any degree of control in light of her minority voting status. Accordingly, the Presiding Judge concludes that Skywave is not entitled to a quantitative integration credit for Ms. Williams and Ms. Cooper's proposals to serve as General Manager and Station Manager, respectively.

64. In the event, however, that the decision reached above is overturned on appeal, Ms. Cooper's equity interest in Skywave would entitle it to a quantitative integration credit of 10 percent, qualitatively enhanced by her status as a minority female and her local residence with some civic involvement.

Diversification

65. Neither Skywave nor its voting and non-voting shareholders have any chargeable media interests.

T.V. 32, INC.

Findings of Fact

66. T.V. 32 is a Kansas corporation with one class of stock (T.V. 32, Ex. #1). Robert B. Liepold is the President and Treasurer, and he owns 15,000 shares of voting stock representing 60 percent of the issued outstanding shares. Thomas B. Jones is Vice President and Secretary, and he owns 10,000 shares of voting stock representing the remaining 40 percent of all shares. Messrs. Liepold and Jones constitute the Board of Directors (T.V. 32, Ex. #1).

67. T.V. 32 has a potential liability in the form of unissued convertible debentures (Tr. 1688). These debentures will represent the values of $50,000 to Gene A. Bechtel, $50,000 to Joseph W. Kennedy and $25,000 to James A. Olson (T.V. 32, Ex. #1, Memorandum of Agreement, p. 2; Tr. 1697). Seven years after the commencement of operations, the debentures are payable with 6 percent interest or are convertible to voting common stock at the option of the holder with Messrs. Bechtel and Kennedy each receiving a 20 percent interest in the voting common stock of T.V. 32, Inc. and Mr. Olson 10 percent (T.V. 32, Ex. #1, Memorandum of Agreement, p. 3). The debentures are convertible earlier, in the event of sale of the television station, if that should occur before the seven year period expires (T.V. 32, Ex. #1, Memorandum of Agreement, p. 3).

Best Practicable Service

Robert B. Liepold

68. Mr. Liepold is the proposed full-time Chief Executive Officer (T.V. 32, Ex. #2, p. 5). He has resided in the Kansas City area between 1969 and 1974 and from 1978 to the present (T.V. 32, Ex. #1, p. 1). Mr. Liepold has been active in Junior Achievement since the 1960(s). He served as an advisor to high school students in new business endeavors and sat on the Board of Directors of Junior Achievement of Mid-America from 1969-1974 and continuously since 1978. In addition, he has been a member of the the Executive Committee since 1980, and served as Chairman of the Board in 1982 and 1983. Mr. Liepold has also been a member of the Board of Directors and the Executive Committee of State Ballet of Missouri since 1979. He served as President of that organization in 1983 and 1985, and as Vice Chairman since 1986. Mr. Liepold has been a member of Visitation Parish of the Catholic Church since 1978, and prior to that attended St. Anne's Parish Church (T.V. 32, Ex. #2, pp. 3-5).

69. Mr. Liepold has no prior broadcast experience.

Thomas B. Jones

70. Mr. Jones proposes to be the station's full-time General Manager (T.V. 32, Ex. #3, p. 5). His duties will include attending to the details of the station's operations including immediate oversight of programming, engineering, sales, and other operating departments. He will also be responsible for the administration of employment prac-

tices and intern programs (T.V. 32, Ex. #2, p. 5). Mr. Jones will move to Kansas City, Missouri in the event that T.V. 32 is the successful applicant (T.V. 32, Ex. #3, p. 5).

71. Mr. Jones has extensive broadcast experience. From 1952-1959, he was employed at the Washington Post stations then co-owned with the CBS network (T.V. 32, Ex. #3, p. 1). He served as a floor director, cameraman, director and producer of programs. He then became Program Director at WTOP-TV, and he also assumed film and program purchasing duties for a Jacksonville, Florida television station which was purchased by the Washington Post during that time period. Between 1959-1961, Mr. Jones was Operations Director of station WJIM-TV, Lansing, Michigan; from 1961-1967, he served as Operations Director of the Binghamton, New York AM-FM-TV facility; then as the Operations Director of a Philadelphia, Pennsylvania AM-FM-TV facility; and finally as Program Director for the entire group of stations operating out of headquarters in Philadelphia, Pennsylvania. During the period between 1968 and 1974, Mr. Jones returned to station WJIM-TV, Lansing, Michigan where he served as Station Manager. From 1975-1978, Mr. Jones served as a communications consultant in Lansing, Michigan, and between 1979-1984 as a consultant for an applicant for a new UHF television station in Lansing, Michigan. He became General Manager of that station when it signed on the air in 1982, and he continued in that capacity until shortly before sale of the station in 1985. Mr. Jones, since that time, is practicing as a communications consultant in the broadcast and cellular telephone fields (T.V. 32, Ex. #2, pp. 1-4).

Diversification

72. Neither T.V. 32 nor Mr. Liepold has any cognizable interest in any medium of mass communications. Mr. Jones has a 10 percent non-voting shareholder interest in Mid Michigan FM, Inc. whose application for a new FM radio station to operate on channel 243A at Dewitt, Michigan was granted pursuant to approval of a settlement agreement in a *Memorandum Opinion and Order* released September 6, 1989 (FCC 89M-2208) Docket No. 88-425.

Conclusions of Law

Best Practicable Service

73. A Memorandum of Agreement was executed on January 19, 1987 by Robert Liepold, Thomas B. Jones, Gene A. Bechtel, Joseph W. Kennedy and James A. Olson. It provides for the issuance of debentures to the Messrs. Bechtel, Kennedy and Olson which represent unsecured indebtedness of the corporate applicant in varying amounts. Mr. Bechtel, in exchange for his services as communications counsel to T.V. 32, is to receive debentures representing unsecured indebtedness of the corporation in the amount of $50,000. Mr. Kennedy will receive debentures representing an unsecured indebtedness of the corporation in the amount of $50,000 in exchange for his services as corporate and litigation counsel to T.V. 32. Mr. Olson will receive debentures of $25,000 for his services in bringing members of the group together and for his investment of $10,000 to defray out of pocket costs in prosecuting the application. The debentures are payable seven years after the commencement of the proposed station's operations at an interest rate of 6 percent per year, or the option holders can convert their debentures to a voting stock interest in the corporation. These conversion rights are wholly independent of the current shareholders and rest solely within the discretion of the debenture holders. Messrs. Bechtel and Kennedy would be entitled to 20 percent of the stock and Mr. Olson 10 percent. T.V. 32 is presently authorized to issue 50,000 shares of stock of which 25,000 are currently issued, leaving 25,000 shares available for issuance upon conversion of the debentures (Tr. 1699). The Memorandum of Agreement sets forth the understanding reached by all of the parties that no additional shares of stock will be issued and no changes made in Skywave's corporate structure (T.V. 32, Ex. #1; Tr. 1525). It further provides, in the event that the station is sold prior to the completion of the seven year period, that the debenture holders would receive the percentages set forth above of the proceeds of the sale, that is, 20 percent each to Messrs. Bechtel and Kennedy and 10 percent to Mr. Olson. Mr. Liepold and Mr. Jones would be entitled to 30 percent and 20 percent, respectively (T.V. 32 Ex. #1).

74. If the debentures to be issued are converted to voting stock interests at the end of seven years, the current voting shareholders, Messrs. Liepold and Jones would be reduced to a total of a 50 percent voting stock interest. Since there is no evidence that these debentures will not be converted, a voting stock interest must be attributed to each future debenture holder in conducting a comparative evaluation of this applicant. (*Signal Ministries, Inc.*, 104 F.C.C. 2d 1482; *Radio Laredo, Inc.*, 87 F.C.C. 2d 353. The likelihood that such options will be exercised is particularly strong here in light of the dominant roles planned by the debenture holders in organizing T.V. 32 and in prosecuting its application, as compared to the relatively small roles played both by Mr. Liepold and Mr. Jones.

75. The Memorandum of Agreement dated January 19, 1987 and referenced above was prepared by Mr. Bechtel and Mr. Kennedy, and it was presented to T.V. 32's principals (Tr. 1709). Mr. Kennedy incorporated the company, and presented the Articles of Incorporation and By-Laws at the organizational meeting of the corporation (Tr. 1696). In addition, Mr. Kennedy followed the course of the comparative hearing and actually cross-examined witnesses during the December 21, 1987 hearing session. Mr. Olson, another prospective debenture holder, first approached Mr. Liepold on behalf of the Messrs. Kennedy and Bechtel (Tr. 1467, 1527-28) after an attempt to recruit another person had failed (Tr. 1678-9). The initial contact occurred between Mr. Bechtel and Mr. Jones on December 13, 1986, just three days prior to the filling of the application (Tr. 1469, 1579-1581). Mr. Kennedy has had a number of contacts with Mr. Liepold and Mr. Jones, some of which have been face to face and others over the telephone (Tr. 1541, 1705, 1758). These contacts have included discussions of Skywave's finances, the relative merits of the various applicants, the progress of the hearing and general discussions as to the status of Skywave's application. In addition, the prospective debenture holders secured the transmitter site, acquired the financing and provided funds as well as services for the applicant. Indeed, the fact that debentures will be issued for their services is proof positive that Messrs. Bechtel, Kennedy and Olson have been actively involved in prosecuting Skywave's application. Mr. Liepold prepared an agenda of discussion for the organizational meeting of January 19, 1987, which assigned an area of responsibility to each participant in T.V. 32 (KCS, Ex. #14, Tr. 1692-93): Mr.

Kennedy would report on the status of the corporation; Mr. Bechtel would discuss the status of the filing; and Mr. Olson would review fiscal matters such as securing a commitment letter, establishing a bank account and collecting and reimbursing expenses. Mr. Liepold also planned that the three future debenture holders would participate in a discussion of T.V. 32's strategic position, game plan and objectives (KCS, Ex. #14). Mr. Kennedy testified that the shareholders of T.V. 32 have discussed plans for the station in a general sense (Tr. 1700) and Mr. Olson, another future debenture holder, indicated that during the course of several corporate meetings, he and other members of the group discussed staffing, programming and operating expenses of the proposed station (Tr. 1747-48). The record further demonstrates that T.V. 32's prospective debenture holders have been involved in meetings and conference calls with other applicants in this proceeding (Tr. 1704-05, 1748).

76. The fact that the debenture holders are not actually principals or for that matter debenture holders at this time does not shield T.V. 32's claim of a 100 percent quantitative integration credit from attack, since it must be assumed, for comparative purposes, that the Messrs. Bechtel, Kennedy and Olson will exercise their options and jointly acquire a 50 percent voting interest in the applicant. The Messrs. Bechtel, Kennedy and Olson will, therefore, be treated as if they were present voting equity owners. When so viewed, the claim of a 100 percent quantitative integration credit is unsupportable. Accordingly, for comparative purposes, T.V. 32 is entitled to at the very most a 50 percent quantitative integration credit for its proposal to integrate the Messrs. Liepold and Jones into the affairs of the station on a full-time basis.

77. The record demonstrates that the Messrs. Liepold and Jones activities on behalf of the applicant have been limited. The actions that they have taken have generally been in conjunction with one of the future debenture holders. Mr. Liepold did secure the financing for the station from a banker recommended by Mr. Olson (Tr. 1738, 1745, 1755). He also reviewed the application which was presented to him by another future debenture holder. Mr. Jones, on the basis of the evidence of record, did little else other than derive the budget. They did, however, along with the prospective debenture holders, participate in organizational meetings. Although it is clear from the record that the Messrs. Bechtel, Kennedy and Olson have had primary responsibility for the initiation, organization and functioning of T.V. 32 and for the preparation, filing and promotion of its application, this does not necessarily support the conclusion that Messrs. Liepold and Jones, who now own 100 percent of the voting equity and ultimately 50 percent of the the voting equity, will not be in a position to both assume and retain managerial roles at the station. The Presiding Judge concludes, therefore, that T.V. 32 is entitled to a 30 percent quantitative integration credit for its proposal to integrate Mr. Liepold, as Chief Executive Officer and 20 percent for Mr. Jones, as General Manager. The 30 percent quantitative integration credit is qualitatively enhanced by Mr. Liepold's residence in the city of license and to a slight to moderate degree by his involvement in the the civic affairs of that community, and the 20 percent by Mr. Jones' decision to move to Kansas City, Missouri in the event that Skywave is the successful applicant. Mr. Jones also has extensive broadcast experience which entitles the 20 percent quantitative integration credit awarded T.V. 32 for his proposed integration to a further slight enhancement.

Diversification

78. The only media interests or associations held at any time relevant to this proceeding is the 12.5 percent nonvoting stock interest in the licensee of station KMBD (AM), Thornton, Colorado held by Mr. Bechtel's spouse and Mr. Bechtel's position as Vice President of the licensee, Mountain View Broadcasting Company.

HOLT LIMITED PARTNERSHIP

Findings of Fact

79. Holt is a limited partnership formed under the laws of the State of Missouri. Its sole general partner is Holt Ventures, Inc. which owns 20 percent of the partnership equity. All of the outstanding stock of Holt Ventures, Inc. is owned by James Holt who is its sole Officer and Director. The limited partners of the applicant are Edward G. Atsinger III and Stuart W. Epperson, each with 40 percent of the equity (Holt, Ex. #1). Betty Lynette Holt, the wife of James Holt, holds the positions of Vice President and Secretary (Tr. 1256, 1261).

Best Practicable Service

James Holt

80. Mr. Holt will work full-time, not less than forty hours a week, as General Manager of the proposed television station. He will be responsible for all aspects of the business and operations of the station, including station policy, sales, procedures, public relations, promotion, programming, and budgetary matters. He will also have final responsibility with respect to the hiring and firing of station personnel and the monitoring of personnel practices. Mr. Holt's duties will also include compliance with all federal and local laws and regulations, including but not limited to EEO matters (Holt, Ex. #2, pp. 2-3).

81. Mr. Holt currently resides in Kansas City, Missouri, and he has been a resident of Kansas City since 1962, except between the years 1981 and 1985 when he lived in Raytown, Missouri. Raytown is a suburb of Kansas City and is located within the Grade B contour of Holt's proposed station (Holt, Ex. #2, p. 1).

82. In 1978, about three months before it went on the air, Holt began working for a new TV station, KYFC TV 50. He worked on the construction crew until the station became operational. At that time, his main duty was directing, but he also did some editing and lighting, as well as set construction, camera alignment, production of station promos, station ID slides, and public service announcements. Mr. Holt left KYFC in 1984 (Holt, Ex. #2, p. 2).

Diversification

83. Neither Holt, Holt Ventures, Inc. nor James Holt have any interest in any broadcast station or any other medium of mass communications (Holt, Ex. #1).

84. Messrs. Epperson and Atsinger own or owned as of the so-called B-cut-off date 100 percent voting control of the following stations:

KPDQ (AM), Portland, OR, 100% interest
KPDQ (FM), Portland, OR, 100% interest
KDIG (AM), San Bernardino, CA, 100% interest
KHAA (FM), Port Sulfur, LA, 100% interest
KGNW (AM), Seattle-Burien, WA, 100% interest
KGER (AM), Long Beach, CA, 100% interest
KAVC (FM), Rosamond, CA, 100% interest
KCFO (AM), Tulsa, OK, 100% interest
KDAR (FM), Oxnard, CA, 100% interest
WEZE (FM), Boston, MA, 100% interest
WRFD (AM), Columbus-Worthington, OH, 100% interest

Atsinger's interests are:

KGFT (FM), Carpinteria, CA, 100% voting control
WNYM (AM), New York, NY, 50% interest
KSLR (AM), San Antonio, TX, 50% interest
KFAX (AM), San Francisco, CA, 50% interest
KKLA (FM), Los Angeles, CA, 50% interest
KZAY (FM), Delaro, CA, 52% interest

(Tr. 1654)

Nancy Epperson's (sister of Edward G. Atsinger and wife of Stuart W. Epperson) interest is:

KKLA (FM), Los Angeles, CA, 50% interest

(Holt, Ex.#3)

Epperson's interests are:

WNYM (AM), New York, NY, 50% interest
KSLR (AM), San Antonio, TX, 50% interest
KFAZ (AM), San Francisco, CA, 50% interest
WTOB (AM), Winston-Salem, NC, 100% voting control

(Holt, Ex.#3)

Conclusions of Law

85. The Messrs. Epperson and Atsinger presented Mr. Holt with a proposal for the Kansas City facility which he agreed to accept, advising him at the time that they would arrange the financing for the proposed station if he would agree to serve as general partner (Tr. 1267). Mr. Holt, who was not previously known to Messrs. Epperson and Atsinger, was recommended to them by an unknown person at Mr. Holt's church (Tr. 1269). Mr. Epperson suggested to Mr. Holt that the applicant entity take the form of a limited partnership (Tr. 1274, 1377-78) and he was given such an agreement which he signed. The Agreement was identical in its terms to an agreement used previously by the Messrs. Epperson and Atsinger in other proceedings (Tr. 1377, 1379). Mr. Holt, in turn, decided that the general partner would take the form of a corporation in order to limit his own personal liability (Tr. 1295). Mr. Holt's equity interest of 20 percent in the venture was determined by the amount of money he was willing to invest in the venture namely $1,000, divided by a total capitalization of $5,000 (Tr. 1290-91).

86. Mr. Holt used a consultant to prepare cost estimates for the construction of the proposed station which he then forwarded to his communications attorney (Tr. 1300-1301). Both communications counsel and Holt's engineer were selected by Mr. Holt based, in the case of communications counsel, on Messrs. Epperson's and Atsinger's recommendation (Tr. 1271). The engineer in turn was recommended by communications counsel whose firm represents the broadcast interests of Messrs. Atsinger and Epperson (Tr. 1902). Holt's engineer has also performed work for Messrs. Atsinger and Epperson (Tr. 1902). The limited partners obtained the commitment from the bank pursuant to which they are required to personally guarantee the loan (Tr. 1345). Mr. Holt, as sole shareholder of the corporate general partner, has no obligation to make a similar guarantee (Tr. 1345). In addition, Holt's limited partners are paying all the expenses for the prosecution of the application (Tr. 1303). Mr. Holt's total personal financial liability for the prosecution of the application and the construction and initial operation of the station is limited to $1,000.00.

87. Mr. Holt has no prior television management experience. The limited partners have extensive broadcast experience and own, separately and jointly, numerous broadcast facilities. In addition, they are totally responsible for financing this venture. It strains credulity to conclude that these individuals will assume a truly passive role and have no involvement whatsoever in the operation of a television facility run by an individual whom they scarcely know and who has no prior broadcast management experience but for which they will be totally liable.

88. Such a "hands off" approach to a broadcast facility is a departure for the Messrs. Atsinger and Epperson from their usual manner of managing broadcast facilities in which they have an interest. The stations owned by Mr. Atsinger individually have managers who report directly to him or through an intermediary (Tr. 1867), and Mr. Atsinger is personally involved in decisions affecting station management personnel and changes in broadcast facilities (Tr. 1871). He also visits the stations with a fair degree of regularity, and he has convened conferences of the station managers during the last two years (Tr. 1871). Mr. Atsinger testified that he considers himself to be a hands on owner (Tr. 1872). Neither Mr. Atsinger nor Mr. Epperson have any limited partnerships or non-voting stock interests in any presently held broadcast facilities.

89. The Presiding Judge concludes that it is simply not credible to accept the Messrs. Atsinger and Epperson's representations that they are and will be merely passive investors in Holt. The extent of their financial commitment, their past extensive broadcast experience as well as the fact that they are actively involved in their other broadcast interests makes it extremely unlikely that they will be content to remain in the background while a relatively inexperienced individual manages a television broadcast facility in Kansas City, Missouri. Accordingly, they will be considered for comparative purposes to have an active equity interest in the venture. Since Messrs. Atsinger and Epperson do not propose to be integrated

into the affairs of the station, Holt will receive at most a quantitative integration credit which represents the equity interest held by the general partner, Holt Ventures, Inc.

90. Mr. Holt will serve as the station's General Manager on a full-time basis. There is no evidence of record which casts doubt on his willingness to meet this commitment. Holt, therefore, is entitled to a 20 percent quantitative integration credit for its proposal to integrate Mr. Holt into the affairs of its station. The 20 percent quantitative integration credit is qualitatively enhanced by Mr. Holt's residence in Kansas City, Missouri and in Raytown, Missouri which is located within the Grade B contour of Holt's proposed station (Holt, Ex. #2). Mr. Holt's broadcast experience at station KYFC TV-50 entitles Holt's quantitative integration to a further, very slight enhancement.

Diversification

91. Messrs. Epperson and Atsinger own individually and jointly 21 radio stations located in Oregon, California, Louisiana, Washington, Oklahoma, Massachusetts, Ohio, New York, Texas, and North Carolina. In addition, Nancy Epperson, the sister of Edward G. Atsinger and the wife of Mr. Epperson holds a 50% interest in an FM station in Los Angeles, California. Although all of the stations are located at a considerable distance from Kansas City, Missouri their sheer number requires that Mr. Holt be assessed a moderate to substantial diversification demerit.

KANSAS CITY TELEVISION, LTD.

Findings of Fact

92. Kansas City Television, Ltd. (KZKC) the licensee of station KZKC (TV), Channel 62, Kansas City, Missouri. KZKC is a Georgia Limited Partnership with one general partner Choice Channel 62 Partnership, and three limited partners. The limited partners are Kansas City TV 62, Ltd. with a 49% beneficial interest, Mary Ellen Moore, with a 0.765 percent beneficial interest, and Nicole Abrams with a 0.765 percent beneficial interest. Media Central, Inc. owns a 58.763 percent general partnership interest in Choice Channel 62 Partnership. The other general partner of Choice Channel 62 Partnership is Choice Channel of Kansas City, Inc. with a 41.237 percent beneficial interest (KZKC, Ex. #I, pp. 1-2).

Integration

93. KZKC seeks no comparative preference in the proceeding based upon the integration of ownership into the management of the proposed modified facility (KZKC, Ex. #I, p. 1).

Diversification

94. Neither KZKC nor Choice Channel 62 Partnership, nor Choice Channel of Kansas City, Inc. have any other cognizable broadcast ownership interests of 5 percent or greater. None of the officers, directors, or 5 percent or greater shareholders of Choice Channel of Kansas City, Inc. has any other cognizable interests as Officer, Director or 5 percent or greater shareholder in a broadcast station.

95. Media Central, which owns a controlling interest of 58.763 percent in Choice Channel 62 Partnership has the following additional media interests: it is (1) the sole shareholder of Knoxville Family Television, Inc., which is the sole general partner (51 percent beneficial interest) of Knoxville Television, Ltd., debtor in possession, the licensee of station WKCH-TV, Knoxville, Tennessee; (2) a 60 percent shareholder of Cape Girardeau Family Television, Inc., managing general partner (1 percent beneficial interest) of Cape Girardeau Family Television Ltd., Partnership (CGFTLP), debtor in possession, the licensee of station KBSI (TV), Cape Girardeau, Missouri;[4] (3) a limited partner (32.4 percent beneficial interest) of CGFTLP; (4) the sole general partner (51 percent beneficial interest) of Honolulu Family Television Ltd. Partnership, debtor in possession, the licensee of station KHAI-TV, Honolulu, Hawaii; (5) a general partner (22 percent beneficial interest) of Canton 67, Ltd., debtor in possession, the licensee of station WOAC(TV), Canton, Ohio; (6) a general partner (45 percent beneficial interest) of Community Service Broadcasting, debtor in possession, the licensee of station WZDX (TV), Huntsville, Alabama;[5] and (7) the sole shareholder of Jackson Family Television, Inc., the managing general partner of Jackson Television, Ltd., debtor in possession, the licensee of station WDBD (TV), Jackson, Mississippi.[6]

96. Morton J. Kent, Chairman of the Board and holder of 22.06% of the voting power of Media Central, is a general partner (33 percent beneficial interest) of Canton 67, Ltd.[7]

97. Stephen D. Kent, Secretary, Treasurer and a Director of Media Central, is a general partner (21.6% beneficial interest) of CGFTLP; the President, a Director, and the 40 percent shareholder of Cape Girardeau Family Television, Inc.,[8] the managing general partner (1% beneficial interest) of CGFTLP;[9] the President, Director and 50 percent shareholder of Columbus Family Television, Inc., the managing general partner of Columbus Family Television, Ltd., Partnership, debtor-in-possession, the licensee of station WXTX (TV), Columbus, Georgia; and a general partner of Columbus Family Television Ltd., Partnership.[10]

98. Donald B. Kent, President of Media Central is also a general partner (5 percent beneficial interest) of Community Service Broadcasting, the licensee station WZDX (TV), Huntsville, Alabama, Secretary, Treasurer, and a Director of Knoxville Family Television, Inc.; and Secretary, Treasurer, and a Director of Jackson Family Television Inc.

99. David J. Kent, a Director of Media Central, is President and a Director of Knoxville Family Television, Inc. and President and a Director of Jackson Family Television, Inc.

100. Jonathan F. Kent is Secretary, Treasurer, Director and 50 percent shareholder of Columbus Family Television, Inc. which is the managing general partner of Columbus Family Television Ltd. Partnership.[11]

101. David Vaughn, who holds 8.27 percent of the voting power of Media Central, is a general partner (10.2% beneficial interest) of Appleton Midwestern Television Ltd., the licensee of station WXGZ-TV, Appleton, Wisconsin; general partner of BBD, Ltd. (33% beneficial interest) a 1.29 percent limited partner of Canton 67, Ltd.; a general partner (1% beneficial interest) of Canton 67, Ltd.; and a limited partner (4.8% beneficial interest) of Wichita Falls Television, Ltd., licensee of station KJTL, Wichita Falls, Texas.

Conclusions of Law

Best Practicable Services

102. KZKC does not propose any integration of ownership into the management of the proposed station. It is, therefore, entitled to no comparative credit under this criterion.

Diversification

103. Media Central, Inc. owns a 58.763 percent general partnership interest in Choice Channel 62 Partnership, the sole general partner in KZKC. As noted above, Media Central has extensive broadcast interests. Accordingly, KZKC is subject to a moderate to substantial diversification demerit under this criterion.

COMPARATIVE COVERAGE ISSUE

104. Set forth below are the total areas and populations within the Grade B contour of each applicant, and the areas and populations common to all applicants. The population figures are based upon the 1980 U.S. Census and the area is expressed in square kilometers (Joint Eng. Ex., Table I).

Applicant	Population	Area
Channel 32	1,534,560	16,346
Mid-Continent	1,600,112	21,965
Skywave	1,601,752	22,595
T.V. 32	1,602,600	22,794
Holt	1,572,736	19,876
KZKC	1,480,815	15,489
Common Area	1,465,394	13,644

105. The following tables show the underserved areas and populations within the applicants' uncommon areas. The population figures are based upon the 1980 U.S. Census, and the area is expressed in square kilometers (Joint Eng. Ex., Table III).

Number of Other TV Services Available

Applicant	0 Population	0 Area	1 Population	1 Area	2 Population	2 Area
Channel 32	0	0	0	0	0	0
Mid-Continent	16,878	1,279	6,360	609	14,447	1,761
Skywave	7,378	313	4,630	117	12,717	1,323
T.V. 32	6,737	249	4,705	111	5,091	1,292
Holt	0	0	0	0	9,389	614
KZKC	0	0	0	0	929	280

Number of Other TV Services Available

Applicant	3 Population	3 Area	4 Population	4 Area	5 Population	5 Area
Channel 32	3,913	21	1,801	31	63,452	2,650
Mid-Continent	26,886	2,056	4,512	435	65,635	2,181
Skywave	26,468	2,220	5,132	521	80,033	4,457
T.V. 32	27,694	2,220	5,098	497	87,881	4,781
Holt	23,654	1,893	3,523	285	70,776	3,440
KZKC	6,614	1,158	636	127	7,242	280

Conclusions of Law

106. The figures set forth above show no decisionally significant differences between the areas and populations to be served by the various applicants. The difference between the largest and the smallest number is less than 10 percent of the total. Accordingly, the record shows that no applicant is entitled to a preference under this criterion since it is awarded only where substantially greater overall coverage exists. [*Christian Bl/cing of Midlands, Inc.*, 99 F.C.C. 2d 578, 582-583 (Rev. Bd. 1984)]. Mid-Continent has been disqualified, therefore, the fact that it will provide a first and second television service is of no decisional significance. However, both Skywave and T.V. 32 will provide a first and second service. They are, therefore, entitled to a substantial preference over both Channel 32 and Holt. [*RAM Enterprises*, 57 F.C.C. 2d 844, 852-53 (Rev. Bd. 1946); *FBC, Inc.*, 55 R.R. 2d 1344, 1346-47 (Rev. Bd. 1983)]. The differences between Skywave and T.V. 32 are not significant as between each other.

ULTIMATE CONCLUSIONS

107. The findings of fact and conclusions of law set forth above establish that of the four applicants which have been found to be technically qualified to become Commission licensees, the proposals of Channel 32 and T.V. 32 are of the greatest merit. Channel 32 has been found to propose a 100 percent quantitative integration credit which is qualitatively enhanced by Mr. Stimble's decision to move to Kansas City, Missouri and by Mr. Lewis' status as a member of a minority group, and his long-term residence in the Kansas City, Missouri area with a slight involvement in the civic affairs of that community. T.V. 32 is credited with only a 50 percent quantitative integration credit qualitatively enhanced by Mr. Liepold's residence in the city of license and to a slight to moderate degree by his involvement in the civic affairs of that community, and by Mr. Jones' decision to move to Kansas City, Missouri in the event that T.V. 32 is the successful applicant and by his extensive past broadcast experience. Channel 32 is, entitled to a moderate preference over T.V. 32 on the basis of its integration proposal and only a minimal to very slight preference over T.V. 32 under the diversification criterion. T.V. 32, however, is entitled to a substantial preference over Channel 32 based on its proposal to provide a first and second service to a significant number of persons. Although the decision is a close one to call, the Presiding Judge concludes that the substantial preference awarded T.V. 32 under the coverage issue outweighs the moderate preference awarded Channel 32 for its 100 percent quantita-

tive integration credit. The minimal to very slight preference awarded Channel 32 under the diversification criterion is not decisionally significant. Accordingly, the Presiding Judge concludes that T.V. 32's proposal will best serve the public interest, and its application will be granted.

RULINGS

108. IT IS ORDERED that the applications of Mid-Continent Communications, Inc. (File No. BPCT-8612162K) and Kansas City Television, Ltd. (KZKC(TV)) (File No. BPCT-861216K8) ARE DISMISSED as not qualified to receive the permit for channel 32 in Kansas City, Missouri.

109. AND IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of T.V. 32, Inc. (File No. BPCT 861216K4) for authority to construct a new television station on channel 32, in Kansas City, Missouri IS GRANTED, and the applications of Channel 32 Broadcasting Company (File No. BPCT-861215KS), Kansas City Skywave, Inc. (File No. BPCT-861216K2), and Holt Limited Partnership (File No. BPCT-861216K7) ARE DENIED.[12]

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTES

[1] Also designated but subsequently dismissed were the applications of Thaddeus Bishop (*Order*, FCC 87M-2306, released September 23, 1987); Mack D. Blair d/b/a Jay Hawk Broadcasting (*Order*, FCC 87M-2306, released September 23, 1987); Channel 32, Inc. (*Order*, FCC 87M-2307, released September 23, 1987); CMTV, Ltd. (*Order*, FCC 88M-2276, released July 15, 1988); MBG Broadcasting Company (*Order*, FCC 87M-2308, released September 23, 1987); Hart and Davis Broadcasting, Inc. (*Memorandum Opinion and Order*, FCC 87M-3140, released December 3, 1987); Victory Media, Inc. (*Order*, FCC 87M-3383, released December 28, 1987); and Mark L. Wodlinger (*Order*, FCC 88M-3357, released October 11, 1988).

[2] Those issues specifically designated against applicants that are no longer parties to this proceeding have been omitted.

[3] By an amendment filed on February 7, 1990 and received by *Order* released on April 12, 1990 (90M-443), KCS reported the death of Brenda Williams. By the terms of an agreement reached between Ms. Williams and Ms. Cooper, Ms. Williams' stock is converted to newly created non-voting stock and becomes the property of her heirs.

[4] Media Central has an option to acquire an additional 40 percent of the common stock of Cape Girardeau Family Television, Inc., and a general partnership interest (21.6% beneficial interest) in CGFTLP.

[5] Media Central has options to acquire an additional beneficial interest of 55% in Community Service Broadcasting.

[6] Media Central also has an option to require an additional 0.5% general partnership interest in Jackson Television Ltd. held by H. Bernard Dixon.

[7] Morton J. Kent is the husband of Martha D. Kent. Morton and Martha Kent are the parents of Jonathan F. Kent, Donald B. Kent, Stephen D. Kent and David J. Kent.

[8] Suzanne R. Kent, the wife of Stephen D. Kent, is the Secretary-Treasurer and a Director of Cape Girardeau Family Television, Inc.

[9] Stephen D. Kent has granted Media Central, Inc. an option to acquire his (1) 40% voting stock interest in Cape Girardeau Family Television, Inc. and (2) general partnership interest (21.6% beneficial interest) in CGFTLP.

[10] Stephen D. Kent has granted Media Central an option to acquire his (1) 50 percent voting stock interest in Cape Girardeau Family Television, Inc. and (2) general partnership interest in Columbus Family Television Ltd., Partnership.

[11] Jonathan F. Kent has granted Media Central an option to acquire his 50 percent voting stock interest in Columbus Family Television, Inc.

[12] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Waiver of Section 36.154(a)
of the Commission's Rules

ORDER

Adopted: March 13, 1990; Released: March 13, 1990

By the Chief, Common Carrier Bureau:

1. In this Order, we waive implementation of the amendments to Section 36.154(a) of the Commission's Rules, 47 C.F.R. § 36.154(a), delineating the separations treatment of mixed use special access lines, *i.e.*, special access lines carrying both interstate and intrastate traffic.[1]

2. The Commission adopted these separations changes based on recommendations prepared by the Federal-State Joint Board in CC Docket No. 80-286.[2] In adopting the Joint Board recommendations, the Commission established January 28, 1990, as the effective date for this change in the separations rules. The requirement that carriers perform separations computations in compliance with the revised rules was subsequently waived until March 14, 1990.[3]

3. The local exchange carriers filed tariff revisions implementing the separations rule changes on December 14, 1989. Aeronautical Radio, Inc., Allnet Communication Services Inc., and the Ad Hoc Telecommunications Users Committee filed petitions to reject or suspend a number of these tariff filings. All local exchange carriers are extending the effective date of their tariffs to May 1, 1990. Accordingly, we waive performance of separations computations in accordance with the revised separations rules until implementing tariffs become effective.

4. Accordingly, IT IS ORDERED, that, pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, implementation of the amendments to Section 36.154(a) of the Commission's Rules, 47 C.F.R. § 36.154(a), IS WAIVED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Decision and Order, 4 FCC Rcd 5660 (1989).

[2] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Recommend Decision and Order, 4 FCC Rcd 1352 (1989).

[3] Waiver of Section 36.154(a) of the Commission's Rules, Order, DA 90-110, rel. Jan. 26, 1990 (Com. Car. Bur.).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-624

In the Matter of

Represcribing the
Authorized Rate of Return
for Interstate Services
of Local Exchange Carriers

ORDER

Adopted: March 14, 1990; Released: March 15, 1990

By the Chief, Common Carrier Bureau:

1. This order amends the pleading schedule of the captioned proceeding as directed by the Commission in its Supplemental Notice of Proposed Rule Making in C.C. Docket 87-313[1], the price caps proceeding. This order also grants in part the Motion for Extension filed in the captioned proceeding on February 21, 1990 by the Consumer Coalition.[2]

1. Consumer Coalition Motion for Extension

2. In its order initiating the captioned proceeding, the Commission established the following schedule of pleadings: carrier rate of return submissions, February 16, 1990; responsive submissions, March 23; carrier rebuttal submissions, April 13; proposed findings and conclusions, June 8; reply findings and conclusions, June 22.[3] This schedule follows the procedural timetable established by Part 65 of the Commission's Rules for rate of return represcription proceedings.[4]

3. On February 21, 1990, the Consumer Coalition moved for a two week extension of the time allowed for the filing of responsive submissions. Consumer Coalition argues that, because the initial submissions raise complex methodological issues, it will need "significantly more time" to examine, test, and respond to the local exchange carriers' (LECs') cost of capital analyses. Consumer Coalition states that its difficulties have been aggravated by the failure of United States Telephone Association (USTA), Southwestern Bell, and US West to serve their submissions upon Consumer Coalition on February 16, which deprived Consumer Coalition of the opportunity to work on its response to those pleadings during the three-day Presidents' Day weekend.

4. US West states that its failure to hand serve its submission on February 16 was an error, while Southwestern Bell contends that its submission was timely served because it was placed in the mail to Consumer Coalition on February 16. No party opposes a brief extension to compensate for service problems, so long as subsequent pleadings are also delayed. US West argues that Consumer Coalition has not shown that LECs have filed anything other than that which was permitted or required to be filed in this proceeding, nor that there is anything unique about the initial submissions that would warrant extending the pleading schedule for two weeks. USTA and Southwestern Bell also oppose a two week extension.

5. It is the policy of the Commission that extensions of time shall not be routinely granted.[5] We find that Consumer Coalition has shown good cause for a brief extension of time to compensate for time lost over the three-day Presidents' Day weekend, but that it has not made a persuasive argument for a longer extension. Responsive submissions will be due March 27, 1990, and all other pleading dates will be likewise delayed.[6]

6. For the guidance of the parties, we note that Part 65 allows mail service of initial submissions, responsive submissions, carrier rebuttals, and requests for oral argument.[7] Hand service on the day of filing is required for documents related to requests for discovery, documents related to requests for cross examination, and for proposed findings and conclusions and reply findings.[8]

2. Changes required by the Price Caps Supplemental Notice

7. In the *Supplemental Notice* the Commission sought comment on proposals to prescribe an earnings zone of reasonableness for price caps carriers and to require carriers to share with their customers a portion of their earnings above some prescribed level.[9] The Commission stated that it was expanding the captioned rate of return represcription proceeding to add the issues of the price caps earnings zone and the sharing mechanism.[10] The Commission directed the Common Carrier Bureau to amend the pleading schedule of this proceeding to allow for the addition of parties and for the submission of testimony on the added issues.[11]

8. We hereby add to the schedule a supplemental submission, due May 1, 1990, and a reply submission, due May 15, 1990. Persons intending to participate in this proceeding who have not already filed notices of appearance must do so by April 17, 1990. Proposed findings will be delayed until June 26, with reply findings due July 10.

9. In the *Supplemental Notice* the Commission recognized that its decisions concerning the price caps earnings zone and the sharing mechanism were still tentative and subject to comment, and that it was possible that the rate of return represcription proceeding might be completed without the prescription of earnings limits for price caps carriers.[12] In order to assure a complete and orderly record on all issues, we direct the parties to maintain the following discipline: Responsive submissions due March 27 shall address only those issues raised by the initial carrier submissions; carrier rebuttals due April 17 shall address only the responsive submissions. Supplemental submissions due May 1 and replies due May 15 shall address only those issues related to (1) the location of the upper and lower formula adjustment marks;[13] and (2) the design and specification of the sharing mechanism.[14] Any party of record may file a supplemental submission or a reply to a supplemental submission.

10. The rate of return submissions authorized in this order, including all argument, attachments, appendices, supplements, and supporting materials such as testimony, data, and documents but excluding tables of contents, shall be subject to the following double spaced typewritten page limits: The supplemental submission of any party

shall not exceed 70 pages in length. The reply to each supplemental submission shall not exceed 50 pages in length.

11. Accordingly, IT IS ORDERED that the Motion for Extension filed February 21, 1990 by Consumer Coalition IS GRANTED to the extent provided herein.

12. IT IS FURTHER ORDERED that schedule of pleadings in the captioned proceeding IS AMENDED as specified herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard Firestone
Chief, Common Carrier Bureau

APPENDIX

REVISED SCHEDULE OF PLEADINGS IN CC DOCKET No. 89-624 March 15, 1990

February 2, 1990	Notices of appearance
February 16, 1990	Initial carrier submissions
March 27, 1990	Responsive submissions
April 17, 1990	Carrier rebuttal submissions
April 17, 1990	Notices of Appearance
May 1, 1990	Supplemental submissions
May 15, 1990	Replies to supplemental submissions
June 26, 1990	Proposed findings and conclusions
July 10, 1990	Reply findings and conclusions

FOOTNOTES

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, FCC No. 90-89 (released March 12, 1990) ("*Supplemental Notice*"). *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rule Making, 4 FCC Rcd 2873 (1989) and Erratum, 4 FCC Rcd 3379 (1989) (together "*Second Further Notice*").

[2] The Consumer Coalition consists of the Consumer Federation of America, the International Communications Association, and MCI Telecommunications Corporation.

[3] Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, CC Docket No. 87-463, and Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, 5 FCC Rcd 197, 210 (1989).

[4] *See* 47 C.F.R. §§65.102(c), -.105(b).

[5] 47 C.F.R. §1.46(a).

[6] The new pleading schedule, which incorporates both this extension of time and the changes discussed below, is set forth in the Appendix.

[7] §§65.102(c)(4), -.106(c).

[8] §§65.103(d), -.104(c), -.105(c).

[9] *Supplemental Notice*, ¶¶ 159-176.

[10] *Supplemental Notice*, ¶¶ 177-182.

[11] *Supplemental Notice* ¶ 181.

[12] *Supplemental Notice*, ¶ 181.

[13] *See Supplemental Notice*, ¶ 162.

[14] *See Supplemental Notice*, ¶¶ 163-168.

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 82-345

In the Matter of

Amendment of 47 C.F.R. § 73.658(j)(l)(i) and (ii), the Syndication and Financial Interest Rules

ORDER

Adopted: March 14, 1990; Released: March 14, 1990

By the Commission:

1. On January 30, 1990, Fox Broadcasting Company (Fox) filed in this docket a Petition for Resumption of Rule Making and Request for Temporary Relief (Petition). After reviewing the Fox Petition and responsive pleadings, we are hereby terminating this proceeding. In a separate Notice of Proposed Rule Making, also adopted today, we are instituting a new Rule Making proceeding to evaluate the financial interest and syndication rules.[1]

2. *Background*. More than six and a half years ago, the Commission tentatively concluded that it would be in the public interest to adopt a "very substantial revision" in the financial interest and syndication rules. *Tentative Decision and Request for Further Comments*, 94 FCC 2d 1019, 1022 (1983). Specifically, the Commission tentatively concluded that it should eliminate the financial interest rule and narrow the syndication rule to prohibit only network participation in domestic syndication of prime time series programs. Subsequently, the Commission encouraged interested parties to negotiate a proposed solution to the complex issues involved. No further action has been taken by the Commission.

3. *Basis For Decision*. The Commission has a public interest responsibility to evaluate whether there is a need to change its rules and policies as the communications marketplace changes. Although the Commission is determined to press the negotiations forward, it is apparent at this point that permitting extended industry negotiations toward a proposed solution to this proceeding has not, so far, been successful. The Commission has determined that it is appropriate for us again to begin actively considering whether any changes in the syndication and financial interest rules are needed. The numerous developments in the video marketplace in the last six and a half years convince us that it would not be appropriate to take any action based on the existing record. Rather than simply issuing a Further Notice of Proposed Rule Making in this docket, however, we have chosen for two reasons to terminate this proceeding and begin a new one. First, our analysis of potential options will be sharpened by a record focusing on existing and future marketplace realities rather than one including voluminous materials that are outdated and may therefore be misleading. Second, this approach will maximize the possibility that the final short round of industry negotiations we are encouraging in MM Docket No. 90-162 will lead to fruitful results.

4. Accordingly, pursuant to sections 4(i), 4(j), 301, 303(i), 303(r), 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(i), 303(r), 313 and 314, IT IS ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] *Notice of Proposed Rule Making in MM Docket No. 90-162*, FCC 90-100, adopted March 14, 1990. Fox's request for temporary relief will be addressed in a separate non-docketed proceeding. We note that, with one limited exception, the new Rule Making proceeding is designated a restricted proceeding under the Commission's *ex parte* rules ten calendar days after release of the Notice of Proposed Rule Making, *i.e.*, beginning March 24, 1990, through June 13, 1990. Because the issues are interrelated, except for any formal petitions for reconsideration and responsive pleadings, any reconsideration proceeding in this docket is also designated as restricted ten calendar days after release of this Order, *i.e.*, beginning March 24, 1990, through June 13, 1990. *See* 47 C.F.R. §§ 1.1200(a), 1.1208.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-162

In the Matter of

Evaluation of the Syndication and
Financial Interest Rules

NOTICE OF PROPOSED RULE MAKING

Adopted: March 14, 1990; Released: March 14, 1990

By the Commission: Chairman Sikes issuing a statement; Commissioner Marshall dissenting in part and issuing a separate statement; Commissioner Duggan dissenting and issuing a dissenting statement.

1. On January 30, 1990, Fox Broadcasting Company (Fox) filed in BC Docket No. 82-345 a Petition for Resumption of Rule Making and Request for Relief (Petition). After reviewing the Fox Petition and responsive pleadings, in a separate Order adopted today, we are terminating BC Docket No. 82-345.[1] By this Notice of Proposed Rule Making, we are instituting a new Rule Making proceeding to evaluate the financial interest and syndication rules. The Fox Petition and responsive pleadings will be incorporated into the record of this proceeding.[2]

2. *Background.* The financial interest and syndication rules were adopted in 1970.[3] The rules prohibit television broadcast networks from (1) purchasing any financial interest in a program other than the right to air the program on the network and (2) syndicating (or having an interest in the syndication of) any programs for non-network distribution, except that network syndication outside the United States of network-owned programs is permitted. *See* 47 C.F.R. § 73.658(j). In 1982, the Commission proposed eliminating the rules.[4] A year later, the Commission tentatively concluded that the rules should be substantially revised.[5] Specifically, the Commission concluded that it should eliminate the financial interest rule and narrow the syndication rule to prohibit only network participation in domestic syndication of prime time series programs. Subsequently, the Commission encouraged interested parties to negotiate a proposed solution to the complex issues involved. This approach did not work, and as stated in our companion Order, we have determined that the best way for the Commission again to begin actively considering whether any changes in the rules are necessary is to terminate BC Docket No. 82-345 and begin this new Rule Making proceeding.

3. *Proposal.* We seek comment on a wide variety of proposals with respect to the financial interest and syndication rules. Specifically, we request comment on the following options: (a) retaining the existing rules intact; (b) eliminating the financial interest rule but retaining the syndication rule intact; (c) eliminating the financial interest rule and modifying the syndication rule as proposed in the *Tentative Decision* in BC Docket No. 82-345; (d) eliminating the financial interest rule and modifying the syndication rule to permit networks to syndicate a certain number or percentage of programs or to participate in a share of the profits of programs syndicated by others; and (e) retaining the existing rules but adding an exception for emerging networks, *e.g.*, by changing the definition of network in 47 C.F.R. § 73.658(j)(4). We also seek comment on alternative proposals regarding the financial interest and syndication rules.

4. *Industry Negotiations/Comment Period.* We believe it is in the public interest to provide interested parties one final short opportunity to negotiate a proposed solution to the issues presented by the financial interest and syndication rules. Accordingly, while we are not designating an FCC staff person (or requesting any other Government employee) to participate in negotiations, we are deferring the beginning of the comment cycle. Comments will be due June 14, 1990. Reply comments will be due August 1, 1990.[6] We do not anticipate extending the period for negotiations. Regardless of whether an industry-negotiated proposed solution is filed, we intend to move expeditiously to reach a decision upon termination of the comment cycle. If a proposed solution is filed, parties will either be able to respond to it in their reply comments or, if appropriate, the Commission will issue a Further Notice of Proposed Rule Making.

5. *Ex Parte Rules.* In order to facilitate any final industry attempt at negotiations, ten calendar days after release of this Notice of Proposed Rule Making, *i.e.*, beginning on March 24, 1990, this proceeding is designated a restricted proceeding under the Commission's *ex parte* rules through June 13, 1990. *See* 47 C.F.R. § 1.1200(a). During that period, *ex parte* presentations to or from Commission decision-making personnel will be prohibited. *See* 47 C.F.R. § 1.1208. We will, however, make one exception. The proceeding will be treated as non-restricted on June 4, 1990, so that industry negotiators may report to the Commission on any progress toward a negotiated proposed solution. Any oral progress reports must be summarized in a written submission for the record; any written progress reports must be submitted for the record. *See* 47 C.F.R. § 1.1206. After June 13, 1990, the proceeding will become a non-restricted proceeding, in which *ex parte* presentations will be permissible, subject to the disclosure requirements set forth in the Commission's rules. *See* 47 C.F.R. § 1.1206.

6. An Initial Regulatory Flexibility Analysis is contained in the Appendix to this Notice of Proposed Rule Making.

7. Authority for issuance of this Notice of Proposed Rule Making is contained in sections 4(i), 4(j), 301, 303(i), 303(r), 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(i), 303(r), 313 and 314.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

This Rule Making proceeding is initiated to obtain comment regarding whether marketplace developments should lead the Commission to make changes in its financial interest and syndication rules. *See* 47 C.F.R. § 73.658(j).

Objectives

The Commission seeks to evaluate its financial interest and syndication rules in light of marketplace developments so that it can ensure that rules in this area maximize the development of a competitive video marketplace that best serves the public interest.

Legal Basis

The proposed action is authorized under sections 4(i), 4(j), 301, 303(i), 303(r), 313 and 314 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(i), 303(r), 313 and 314.

Reporting, Recordkeeping and Other Compliance Requirements

None.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

Any rule changes in this proceeding could affect television program producers, television networks and their affiliate stations, non-network television stations, cable networks, cable television program producers, cable television networks and cable television operators. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

The Notice solicits comments on a variety of alternatives.

STATEMENT OF CHAIRMAN ALFRED C. SIKES

Re: Evaluation of the Financial Interest and Snydication Rules

After almost ten years of debate in several different forums, the financial interest and syndication rules have come full circle to their point of origin -- this Commission. By this Notice of Proposed Rule Making and the companion Order terminating the long-dormant 1982 Rule Making proceeding, the Commission intends to provide a clean administrative slate upon which a definitive resolution of this matter can be written, hopefully by the end of this year.

The Commission has deferred the submission of comments responding to the Notice for a period of ninety days in order to allow the parties to the present industry negotiations to arrive at a consensus proposal. During this ninety-day period *ex parte* contacts will be generally prohibited in the interest of assuring that the parties devote their fullest possible efforts to securing an agreement. Within this overall restriction two limited exceptions are provided. For ten days after the effective date of the Notice, the proceedings will be subject to the "permit but disclose" *ex parte* rules in order that those Commissioners wishing to do so may meet with interested parties to impress upon them our expectation that the parties will pursue their negotiations seriously, and to have the benefit of the parties' views. We have also provided a similar one-day period later in the process to allow the parties to provide us with a report on the progress of the negotiations. This approach, albeit unconventional, in my view accurately balances the need for contact between the Commission and the parties during the opening days of the Rule Making with the need to focus the parties' attention on the negotiations for the remainder of the period.

I remain of the view that the nature of the issues involved in this proceeding makes it uniquely suitable for alternatives to the existing rules to originate with the parties. At the same time, however, I would stress that this ninety-day period represents the absolute last opportunity the industry negotiators will have to present us with a particular proposal that can serve as the focal point for responsive public comment. It is my earnest hope that they will utilize the singular opportunity we have provided them to do just that.

SEPARATE STATEMENT OF COMMISSIONER SHERRIE P. MARSHALL

In the Matter of Evaluation of the Syndication and Financial Interest Rules

Today's decisions are a clear statement to Hollywood and the networks: Maintaining the financial interest and syndication rules without change is highly unlikely. If the parties cannot solve their differences on how these rules should be recast, the Commission will.

I am dissenting to one portion of the Commission's notice: the decision to preclude interested parties from discussing the financial interest and syndication rules with Commissioners during the initial comment period. I consider that foreclosure to be inconsistent with our duties as public officials in considering Rule Makings, which by their very nature involve broad issues of public concern. I understand the concern that the Commission's Rule Making proceeding should not distract the parties from the negotiations, and I wholeheartedly agree. However, the Commission has a countervailing obligation to allow all interested persons, including those not part of the industry negotiations, a full and fair opportunity to advise us of their views.

I have already spent a good deal of time educating myself on the issues presented in this Rule Making. But a few meetings cannot substitute for a lifetime in the industry. In my view, all the Commissioners should have the same time to fully explore these complex issues.

DISSENTING STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In re: Evaluation of the Syndication and Financial Interest Rules--BC Docket No. 82-345 and MM Docket No. 90-162

I regret profoundly that my first significant vote as an FCC Commissioner finds me in dissent from my chairman, who has been gracious and generous to me, and for whom I have the greatest respect. Serious issues are at stake, however.

First, I oppose launching a restricted proceeding on this important issue. I believe that on matters of import, the Commission, if it hopes to achieve a genuinely balanced and well-informed result, needs to hear the concerns of all interested parties. To restrict the proceeding could send a signal that the Commission's mind is made up and that Commissioners are not open to persuasion. Any such perception, even if mistaken, would in my judgment be unfortunate.

As a new commissioner whose position on the issues surrounding this proceeding is far from settled, and who needs to hear the spirited advocacy of parties on all sides, I feel that it would be particularly inappropriate for me to vote to restrict this proceeding. Hence my dissent.

Second, while I enthusiastically support and concur in the Commission's order ending the previous Rule Making, I have grave reservations about launching a new Rule Making while negotiations among the private parties are still under way. The spotlight, in my judgment, should at this delicate moment be on the negotiations and only on the negotiations. The parties should not be tempted by the alluring prospect that should their efforts fail, a better result can be obtained through a new Rule Making by the Commission.

This Notice of Proposed Rule Making could be interpreted by the parties as paving the way for the failure of negotiations. It could thus undermine the seriousness of the parties at the negotiating table. Even though the Commission is deferring the comment period to provide the parties "one short opportunity to negotiate a proposed solution to the issues presented by the financial interest and syndication rules," I am concerned that some parties will be tempted to conclude, by our apparent haste to launch a new Rule Making, that we already expect the negotiations to fail.

Because I am determined to concentrate the minds of the participants upon the negotiations, I find myself unable to support a Commission decision to announce a new Rule Making even before the negotiations have run their course.

I am a long way from any settled conclusion on this controverted issue, beyond the emphatic conviction (which I share with Senator Inouye) that a successful agreement between the private parties is the best way to conclude this matter.

In pursuit of that end, let me say this final word: It would be a grievous mistake for any party to these negotiations to determine, on the basis of this Commission action, that failed negotiations will produce a more satisfactory outcome than successful ones. Those who leap to that conclusion could find themselves repenting at leisure. I urge the parties, therefore, to return with new resolve to their negotiations.

FOOTNOTES

[1] *Order*, FCC 90-99, adopted March 14, 1990.

[2] Fox's request for temporary relief will be addressed in a separate non-docketed proceeding.

[3] *Report and Order in Docket No. 12782*, 23 FCC 2d 382, *on reconsideration*, 25 FCC 2d 318 (1970), *aff'd sub nom. Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971).

[4] *Notice of Proposed Rulemaking in BC Docket No. 82-345*, 47 Fed. Reg. 32,959 (1982).

[5] *Tentative Decision and Request for Further Comments in BC Docket No. 82-345*, 94 FCC 2d 1019 (1983).

[6] Procedures regarding the filing of comments are set forth in sections 1.415 and 1.419 of the Commission's Rules. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

[7] Ten calendar days after release of this Notice of Proposed Rule Making and the companion Order, i.e., beginning on March 24, 1990, the proceeding involving the temporary relief aspect of the Fox Petition is also designated a restricted proceeding, as is any reconsideration proceeding in BC Docket No. 82-345. *See Order*, FCC 90-99, adopted March 14, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
COMMUNICATIONS SATELLITE CORPORATION
Revisions to
Tariff F.C.C. No. 103

Transmittal No. 771

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1990; Released: March 14, 1990

By the Chief, Common Carrier Bureau:

1. In Transmittal No. 771, Communications Satellite Corporation (Comsat) proposes revisions to its Annual Contract Video Service on Transponder No. 86, to reflect that this service is no longer subject to preemption for TAT-8 cable restoration. The tariff retains the $7.00 per minute discounted rate originally proposed for this service, which initially became effective on January 17, 1989, in Comsat Transmittal No. 712.

2. On January 2, 1990, Pan American Satellite (Pan Am Sat) filed a petition to suspend and investigate Transmittal 771, arguing that the rate Comsat is charging for its Annual Contract Video Service is unjust and unreasonably low in contravention of an Order issued by the Common Carrier Bureau in Communications Satellite Corp., 4 FCC 2d 4987 (Com.Car.Bur. 1989). Petition at 4. Pan Am Sat requests that the Commission eliminate the current 45 percent discount on the grounds that it is discriminatory in violation of Title II of the Act, and adjust the rate independently of any action taken concerning Transmittal 771. *Id.*

3. In reply, Comsat argues that even though restoration service has been removed from Transponder 86, the 45 percent discounted rate should be retained because its existing customers, who on the assumption of paying a $7.00 rate, made commitments to Comsat and incurred the costs necessary to access Transponder 86, should not now be faced with a rate increase. Comsat also contends that this rate is fully cost-justified because the revenues generated by existing customers cover the tariffed rate that would be applicable if a customer took Transponder 86 on a standard, undiscounted basis and Comsat itself is leasing Transponder 86 at a 45 percent discount. Reply at 2-4. *See also* Transmittal 771, Rate Development Information, Sections B and C.

4. The Common Carrier Bureau has reviewed the tariff transmittal and the pleadings. We conclude that the proposed revisions are not patently unlawful so as to warrant rejection and that they present no questions that warrant suspension or investigation at this time.[1]

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate Comsat Tariff F.C.C. No. 103, Transmittal 771, filed by Pan American Satellite IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] In a companion Order released concurrently with the instant Order, we are directing Comsat to show cause why the customers for Annual Contract Video Service should not be required to pay a higher rate reflecting the fact that the service is no longer subject to preemption. *See* Communications Satellite Corporation, Tariff F.C.C. No. 103, Transmittal No. 771, Order To Show Cause, DA 90-_____, released _____, 1990 (Com.Car.Bur.). Notwithstanding Pan Am Sat's assertions, we cannot examine the lawfulness of the current rate as part of our review of Transmittal 771 because the transmittal is not proposing to change the rate that is already in effect.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
COMMUNICATIONS SATELLITE CORPORATION
Revisions to
Tariff F.C.C. No. 103

Transmittal No. 771

ORDER TO SHOW CAUSE

Adopted: March 14, 1990; Released: March 14, 1990

By the Chief, Common Carrier Bureau:

1. Annual Contract Video Service was initiated by the Communications Satellite Corporation (Comsat) on November 3, 1988 in Transmittal No. 712, at a rate of $7.00 per minute. This service was offered through Transponder 86, a transponder located on a spare satellite primarily reserved for restoration service, and thus highly preemptible. The $7.00 per minute rate represents a 45 percent discount from similar services offered on standard transponders and was justified because this service could be preempted for the restoration of another Atlantic satellite which failed to operate, or, on two hours notice, for restoration of TAT-8 fiber optic cable.[1] *See* Transmittal No. 771, Rate Development Data, Section A.

2. In order to attract customers to this offering, Comsat offered Annual Contract Video Service on more flexible terms in Transmittal No. 723. Although these revisions became effective, the Common Carrier Bureau Order denying petitions against that transmittal stated that if restoration service (and thus the high risk of preemption) were ever moved from Transponder 86, Comsat would be expected to file rate revisions reflecting the new degree of risk. *See* Communications Satellite Corporation, 4 FCC 2d 4987 (1989) (*June 9 Order*). On September 29, 1989 Comsat filed a letter with the Commission stating that effective October 1, 1989, TAT-8 cable restoration service would be removed from Transponder 86 and that this service would no longer be offered to new customers.

3. Comsat Transmittal 771 revises the description of Annual Contract Video Service to reflect that this service is no longer subject to preemption inasmuch as TAT-8 cable restoration service has been moved from Transponder 86 to a different satellite in the Atlantic ocean region. Transmittal 771 deletes all provisions in Transmittal 723 describing the fact and terms of preemption.[2] The transmittal does not, however, change the discounted rate.[3]

4. In support of its refusal to change the current rate, Comsat asserts that its existing customers, who on the assumption of paying a $7.00 rate, made commitments to Comsat and incurred the costs necessary to access Transponder 86, should not now be faced with a rate increase. Comsat also contends that this rate is fully cost-justified because: (1) the revenues generated by existing customers cover the tariffed rate that would be applicable if a customer took Transponder 86 on a standard, undiscounted basis; and (2) Comsat itself is leasing Transponder 86 at a 45 percent discount. *See* Transmittal 771, Rate Development Information, Sections B and C.

5. In the *June 9 Order* the Bureau stated:[4]

> In the event TAT-8 restoration is moved from Transponder 86 . . . the nature of the customer risk justifying the 45 percent discount could be materially affected. We would expect Comsat, in such a case, to file a new transmittal with proposed rate revisions reflecting changes in the degree of risk associated with service provided through the use of Transponder 86.

Comsat failed to file any rate revisions.

6. In light of the expectations expressed in the *June 9 Order* and Comsat's failure to file any rate revisions in Transmittal 771, we now find it necessary to direct Comsat to file an answer showing cause why the customers for Annual Contract Video Service should not be required to pay a revised rate reflecting the fact that the service is no longer subject to preemption. This answer shall be filed no later than March 22, 1990. Oppositions to Comsat's answer may be filed no later than March 28, 1990. Replies may be filed no later than April 3, 1990.

7. Accordingly, pursuant to Section 403 of the Communications Act, 47 U.S.C. § 403, and Section 1.701 of the Commission's Rules, 47 C.F.R. § 1.701, Communications Satellite Corporation IS ORDERED to SHOW CAUSE why the customers for Annual Contract Video Service should not be required to pay a revised rate reflecting the fact that the service is no longer subject to preemption.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] A contract video customer under the initial preemptible service plan would pay $12,775 per month (21,900 minutes @ $7.00 / 12 = $12,775 per month) for 60 minutes of service per day. A customer for the standard video service pays either $23,320 per month for half duplex service, or $15,120 per month for simplex service.

[2] Specifically deleted is language which specified that: (1) Transponder No. 86 could only be used for contract video service when cable restoration was not in progress; (2) Annual Contract Video Service could be preempted for restoration of the TAT-8 cable system on two hours notice; and (3) in the event confirmed bookings were preempted, Comsat was not obligated to provide spare capacity. *See* Transmittal 771 and Transmittal 723, Sections 4.7 and 4.7.8. Transmittal 771 thus reflects that there is now no risk of preemption for Annual Contract Video Service.

[3] On January 2, 1990, Pan American Satellite (Pan Am Sat) filed a petition requesting that the Commission suspend and investigate Transmittal 771. This petition has been denied. Communications Satellite Corporation, DA 90-_____, released _____, 1990.

[4] *June 9 Order* at n.3.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-471

In the Matter of

AT&T COMMUNICATIONS, INC.
Tariff F.C.C. No. 15
Competitive Pricing Plans

Transmittal No. 1215

Holiday Rate Plan

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1990; Released: March 23, 1990

By the Commission:

I. INTRODUCTION

1. On December 8, 1989, AT&T Communications, Inc. (AT&T) filed a petition for reconsideration of this Commission's November 8, 1989, *Memorandum Opinion and Order* finding AT&T's Holiday Rate Plan (HRP) unlawfully discriminatory under Section 202(a) of the Communications Act of 1934, 47 U.S.C. § 202(a).[1] The Competitive Telecommunications Association (CompTel), National Telecommunications Network (NTN), MCI Telecommunications Corporation (MCI), and US Sprint Communications Company Limited Partnership (US Sprint) filed oppositions to AT&T's petition and AT&T submitted a reply. For the reasons set forth below, we deny AT&T's petition for reconsideration.

II. BACKGROUND

2. In Transmittal No. 1215, AT&T introduced Tariff 15 in which it proposed to file Competitive Pricing Plans. Each plan would establish customer-specific rates designed to meet the offerings of competing carriers. Transmittal 1215 also introduced the Holiday Rate Plan (HRP) as the first of the Tariff 15 plans. Under HRP, AT&T offered the Holiday Corporation a progressive discount from the PRO America II rates[2] set forth in AT&T Tariff F.C.C. No. 1 and an additional discount based on volume. AT&T described HRP as a competitive response to an offer MCI made to Holiday. AT&T claimed that HRP did not violate the prohibition against unreasonable discrimination in Section 202(a) of the Communications Act because the offer was fully justified under the principle of competitive necessity.[3] AT&T argued that it had satisfied the competitive necessity test because MCI had offered to provide service to Holiday at rates substantially below either MCI's or AT&T's existing tariffed rates and because Holiday planned to use MCI's services unless AT&T offered a substantially more competitive price.

3. Fourteen of AT&T's competitors and a group representing small telephone exchange companies petitioned for rejection or suspension and investigation of HRP. Finding that the petitioners had raised significant legal, policy, and factual issues, the Commission initiated an investigation into the lawfulness of HRP.[4]

4. Our *HRP Final Order* noted that MCI claimed that its original offer was not limited to Holiday, that AT&T disputed that claim, and that the MCI rebuttal stated that MCI "will provide service to any entity under terms and conditions, including price, set forth in these offers, . . ."[5] The terms of the MCI offer to Holiday were filed in this proceeding and were made public. We found that, in view of these developments, the MCI offer "is now a general one to customers willing to accept the same commitments," but "AT&T has not modified its tariff to make HRP as broadly available as MCI's competing offer."[6] We said "AT&T cannot continue to justify its customer specific tariff as a competitive response to an MCI offering that clearly now is generally available."[7] We reasoned that "[t]he affirmative defense of competitive necessity under the Communications Act does not create a right to introduce discrimination not present in the offer to which the carrier is responding."[8] This Commission ordered AT&T to file tariff revisions removing the Holiday Rate Plan from Tariff 15.

III. DISCUSSION

5. AT&T challenges our conclusion that HRP is unlawful. AT&T argues that: (1) there is no basis in the record for what it characterizes as our finding that the MCI offer to Holiday became generally available in December, 1988; (2) the revisions to the Tariff 15 general regulations AT&T filed October 23, 1989 under Transmittal No. 1854, prior to the adoption of the *HRP Final Order*, moot any issues relating to the prospective unlawfulness of HRP; and (3) even if MCI's offer was generally available, this Commission should have considered whether HRP was justified on grounds other than competitive necessity. We find these arguments unpersuasive. AT&T has failed to present any evidence of a legal or factual nature demonstrating that our conclusions in the *HRP Final Order* were erroneous.

A. General Availability of MCI's Offer

1. *Pleadings*

6. AT&T contends that the record does not support our finding of "general availability." It argues that a carrier must take affirmative action to inform customers of an offering in order to make that offering generally available. AT&T maintains that an offer made by an unregulated firm "cannot be found generally available unless there is proof that it appears in media advertisements or sales literature or that it was otherwise communicated to all actual or prospective customers." AT&T Petition at 3. AT&T argues that there was no record evidence that MCI took such affirmative action and that mere assertions by MCI's counsel or statements in a legal brief that MCI "would offer the same terms to other customers on request" are insufficient evidence of general availability. *Id.* at 5.

7. AT&T also complains that our finding is inconsistent with the Due Process Clause of the Fifth Amendment, the Administrative Procedure Act (APA), and the scope of the

"Notice" instituting the investigation. AT&T contends that this Commission violated AT&T's due process rights because the conclusions in *HRP Final Order* were based on representations in MCI's rebuttal to which AT&T had no opportunity to respond. AT&T argues that this Commission cannot give decisional weight to MCI's "eleventh hour assertions" without conducting further proceedings to assess their sufficiency, accuracy, and legal significance. *Id.*[9]

8. CompTel believes it is unlikely that the marketplace was unaware of MCI's generally available offer in light of the amount of publicity surrounding this Commission's proceeding. It maintains that AT&T's APA and due process rights were not violated since AT&T could have sought leave at any time to respond to MCI's comments. CompTel Opposition at 3-5.

9. MCI argues that the record amply supports this Commission's finding that MCI's Holiday offer was generally available. It asserts that nothing in the Communications Act or this Commission's Rules requires MCI to advertise its service offerings in newspapers. MCI Opposition at 2-3. MCI calls utterly absurd AT&T's contentions that AT&T's due process rights have been violated. Since the HRP investigation was a non-restricted proceeding under the Commission's *ex parte* rules, MCI maintains that AT&T was not prevented from responding to MCI's December 20, 1988, rebuttal. Furthermore, it notes that AT&T had ample opportunity to submit written pleadings to attempt to justify HRP on grounds other than competitive necessity. MCI states that AT&T simply did not use its opportunities effectively. *Id.* at 6-7.

10. US Sprint claims that the question of whether MCI's offer to Holiday was generally available cannot be used as a basis for reconsideration since the Commission evaluated and rejected AT&T's evidence on the matter in the investigation. US Sprint Opposition at 3.

11. AT&T submitted a reply to MCI's petition which reiterates the arguments made in its Petition.

2. Discussion

12. AT&T's claims that the term "generally available" should not be used to describe the MCI offering are misplaced. Our determination to reject AT&T's affirmative defense of competitive necessity did not turn on a measurement of MCI's offering against a definitive standard of general availability, but rather on our finding that AT&T's offering was less available than MCI's. The record before us at the time of the *HRP Final Order* did demonstrate that the MCI offering had been broader than HRP since at least December 1988. The reconsideration petition does not present any argument that would cause us to conclude that our prior holding is incorrect.

13. AT&T was not prejudiced by our reliance upon statements in the MCI rebuttal as a basis for finding that the MCI offering is now broader than Holiday. AT&T has not demonstrated that it could or would have presented any evidence or argument that casts doubt upon that finding if we had invited supplemental pleadings at that time. Moreover, we permitted *ex parte* presentations and filings in this proceeding and AT&T in fact made *ex parte* presentations after December 1988. Accordingly, there is no reason to reopen this proceeding.

B. Effect of AT&T Transmittal No. 1854

1. Pleadings

14. AT&T maintains that "intervening events" have mooted the question of HRP's prospective lawfulness. AT&T explains that, prior to this Commission's adoption of the *HRP Final Order*, AT&T filed revisions to Tariff 15 under Transmittal No. 1854 which made HRP generally available. Those revisions provide, *inter alia*, that all competitive pricing plans under Tariff 15, including HRP, "will also be made available to any other customers demonstrating that they have received substantially similar offers from the competing interexchange carrier." AT&T Petition at 5. AT&T contends that "the prospective lawfulness of HRP has no present or future significance" because its revisions extend the preferential HRP rate to all customers to whom MCI has extended an offer, as required by this Commission's Order. *Id. at 6.*

15. The commenters disagree with AT&T's contention that the revisions have mooted all questions of lawfulness. NTN maintains that the HRP *Final Order* is not moot because AT&T "is continuing its campaign to implement single-customer tariff offerings and that Order provides guidance on the matter." NTN Opposition at 4. Furthermore, the commenters criticize AT&T for relying on tariff revisions which had not taken effect at the time AT&T filed its petition for reconsideration. *See, e.g.*, MCI Opposition at 5; US Sprint Opposition at 4. MCI adds that the only action AT&T could have properly taken to assure the "prospective lawfulness of HRP" would have been to discontinue the service and remove the offering from its tariff. MCI Opposition at 4. US Sprint also argues that if MCI's offer to Holiday expired in December 1988, as MCI claims, then AT&T can no longer justify HRP under the competitive necessity test. US Sprint Opposition at 5.

2. Discussion

16. We reject AT&T's argument that Transmittal 1854 cured the prospective unlawfulness of HRP. At the time we ruled on HRP, Transmittal 1854 had just been filed by AT&T. Under Section 203 of the Communications Act of 1934, 47 U.S.C. § 203, this Commission has up to 90 days to review tariff filings. Tariff revisions do not become effective until the end of the review period. Thus, Transmittal 1854 was still pending when AT&T relied upon it in its petition for reconsideration of the *HRP Final Order*. Pending tariffs provide no support for the claim that an unlawful offering has been cured. Indeed, on January 19, 1990, the Common Carrier Bureau suspended Transmittal 1854 for the full statutory period of five months.[10] Since these revisions have never taken effect, we need not reach the question of whether those revisions could have remedied the defects identified in the *HRP Final Order*. We find that the issue of HRP's prospective lawfulness was not moot when we adopted the *HRP Final Order* and is not moot at this time.

C. Alternative Justifications for AT&T Transmittal No. 1215

1. Pleadings

17. AT&T maintains that, even if this Commission correctly concluded that HRP was not justified by competitive necessity, that merely raises the question of whether

the continuation of HRP could be justified on grounds other than competitive necessity. According to AT&T, the "Notice" instituting the investigation asked parties to discuss all circumstances in which single-customer offers are lawful and did not limit the inquiry to whether the competitive necessity doctrine alone justifies rate disparities. AT&T contends that it demonstrated in its direct case that single-customer offers are not *per se* invalid and can be lawful when such offers reflect competitive forces, even if such offers are not based on competitive necessity. *Id.* at 7-8.

18. The commenters argue that this Commission was not obligated to consider other legal justifications for HRP. They note that AT&T has insisted from the time HRP was filed until the conclusion of the investigation that its rate to Holiday was justified on the basis of competitive necessity. They maintain that AT&T should not be allowed to expand the scope of its defense at the reconsideration stage. *See, e.g.*, MCI Opposition at 7; US Sprint Opposition at 5-6. NTN believes this Commission has complete discretion to decide, as we did in the Order, that the presence or absence of "competitive forces," and its relevance to determinations of unreasonable discrimination under Section 202(a) of the Communications Act, must be examined in a Rule Making of general applicability.

2. *Discussion*

19. We did not consider justifications for HRP other than competitive necessity because AT&T did not proffer any. AT&T insisted in the description and justification accompanying Transmittal 1215, and in its direct case, that HRP was justified on grounds of competitive necessity.[11] AT&T had ample opportunity to raise alternative justifications for HRP during the investigation, and AT&T cannot now cure its failure to advance them on reconsideration.[12]

20. Accordingly, IT IS ORDERED that the petition for reconsideration filed by AT&T Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* AT&T Communications, 4 FCC Rcd 7933 (1989) (*HRP Final Order*).

[2] PRO America II (PRO II) is an optional calling plan under which customers obtain interstate long distance voice service. PRO II requires a customer to pay a fixed monthly fee in return for a discounted usage rate schedule based on seven mileage bands. It is designed for business customers with calling volumes that are larger than a typical MTS customer, but smaller than the volume that would justify obtaining WATS or other services, or who desire the detailed billing and other features not available with WATS.

[3] In order to justify under the competitive necessity doctrine an offering that discriminates among customers for the same service, a carrier must show that: (1) an equal or lower priced competitive offering is available to the customer of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet that competitive offering without undue discrimination; and (3) the discount contributes to reasonable rates and efficient services for all users. *See* Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d, 923, 948 (1984) (*Volume Discount Order*).

[4] *See* AT&T Communications, 4 FCC Rcd 7712 (1988) (*HRP Investigation Order*).

[5] *HPR Final Order*, 4 FCC Rcd at 7934.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] AT&T also argues that reliance on MCI's Rebuttal violated AT&T's Due Process rights by depriving it of the opportunity to advance justifications for HRP other than competitive necessity. We address this argument in Section C, *infra*.

[10] *See* AT&T Communications, Inc., CC Docket No. 90-11, DA 90-44 (Com.Car.Bur. Jan. 19, 1990).

[11] *See* AT&T Description and Justification, Tariff F.C.C. No. 15, Transmittal No. 1215, at 9-12; AT&T Direct Case, Transmittal No. 1215, CC Docket No. 88-471, at 12-26.

[12] This is not the first time AT&T has raised this argument. As we noted in the *HRP Final Order*, AT&T suggested at the conclusion of the HRP investigation in an *ex parte* statement that HRP could not be found prospectively unlawful without a further investigation giving it the opportunity to raise new justifications. *HRP Final Order* at 7935 n.2, *citing* Letter from B.H. Walling, Jr., AT&T to Secretary, FCC, dated March 14, 1989, Attachment at 9. We rejected AT&T's argument, concluding then, as we do now, that AT&T "has had a full opportunity in this investigation to present whatever justification it chooses for its rates." *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-626

In the Matter of

Amendment of Part 15 of the
Commission's Rules to Permit
Cordless Telephone Operation
on Off-set Frequencies

ORDER

Adopted: March 16, 1990; Released: March 23, 1990

By the Office of Engineering and Technology:

1. The Telecommunications Industry Association (TIA) has requested that the Commission extend the period for filing reply comments in response to the Rule Making in GEN Docket No. 89-626. Reply comments currently are due March 20, 1990. TIA requests an extension of the reply comment period to April 4, 1990.

2. TIA argues that the technical issues are complex and have important long-term implications. Further, TIA claims that the extension will permit it to review all the comments which may be filed and to prepare and coordinate reply comments with its numerous members. TIA indicates that it has a meeting scheduled with its members for March 27, 1990, which should provide it with the opportunity to coordinate with them. TIA requests a week from the date of that meeting to prepare its comments.

3. We believe that it is in the public interest to develop a complete record in this proceeding by allowing TIA to address fully the technical issues raised in the NPRM. TIA has adequately justified its requested extension, and the extension will not impede the Commission's progress in this proceeding. For these reasons, we are granting the requested extension of time. We believe that 15 days should provide ample time for all parties to reply to the comments received in response to the NPRM.

4. This action is taken pursuant to authority found in Section 4(i), 302, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 302, and 303, and pursuant to Sections 0.31 and 0.241 of the Commission's Rules 47 C.F.R. Sections 0.31 and 0.241.

5. Accordingly, IT IS ORDERED that the period for filing reply comments in this proceeding IS EXTENDED from March 20, 1990 to April 4, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-533

In the Matter of

CINCINNATI BELL TELEPHONE COMPANY Tariff F.C.C. No. 35	Transmittal No. 535
SOUTHERN NEW ENGLAND TELEPHONE COMPANY Tariff F.C.C. No. 39	Transmittal No. 480
AMERITECH OPERATING COMPANIES Tariff F.C.C. No. 2	Transmittal No. 401

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: March 16, 1990; Released: March 20, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On November 15, 1989, the Common Carrier Bureau (Bureau) instituted an investigation into the lawfulness of rates for special access DS3 and DS3 equivalent services set forth by Cincinnati Bell Telephone Company (CBT) in Transmittal No. 535, and by Southern New England Telephone Company (SNET) in Transmittal No. 480.[1] Transmittals 535 and 480 became effective November 16, 1989. The *Investigation Order* suspended these rates for one day and ordered CBT and SNET to keep accurate account of all of the earnings received pursuant to their respective DS3 rates which are the subject of this investigation. On February 2, 1990, the Bureau incorporated into the instant investigation and imposed an accounting order on Ameritech Operating Companies (Ameritech), Transmittal No. 401, revisions relating to the DS3 Local Distribution Channel (LDC) rates.[2] By this Order, we designate the specific issues to be examined in this investigation.

II. BACKGROUND

2. In Transmittal 480, SNET based its rates on a comparison of its DS1 and DS3 rates. Although SNET submitted a unit cost analysis, its DS3 rates are formulated solely from the crossover between its DS1 and DS3 rates. SNET's filing shows that its DS3 rates vary from 6.8 to 11.6 times its DS1 rates, depending on the quantity of DS3 channels purchased and the duration of the service commitment. CBT's general DS3 rates are based strictly on multiples of its DS1 rates. These ratios range from 7 to 1 to 16 to 1, again depending on the quantity of DS3 channels purchased and the time commitment. Though it did not provide a unit cost study, CBT estimated expected demand and revenue. Ameritech provided information regarding its average DS3 individual case basis (ICB) fully distributed costs over a six month period. However, the carrier based its general rates for its DS3 LDCs, which contain term and volume discounts, not on costs, but on multiples of its DS1 rates. The above-captioned transmittals were contested by various petitioners who, among other things, argued generally that the crossover ratios for DS1 to DS3 service used by the respective carriers are unreasonable.[3]

3. The *Ameritech Investigation Order* said that an investigation of Ameritech's general rates for the LDC portion of its DS3 service was warranted because the cost support materials submitted by Ameritech do not demonstrate that a crossover ratio between DS1 and DS3 services will approximate costs.[4] The *Investigation Order* found that, although the general DS3 rates filed by CBT and SNET were not so unlawful as to require rejection, they did raise sufficient questions to warrant investigation.[5]

III. DISCUSSION

4. The *Strategic Reconsideration Order* [6] concluded that, due to changed circumstances, strategic pricing of HiCap service (DS1 service) by the LECs is no longer justified. Accordingly, the Commission directed the LECs to refrain from strategic pricing and establish cost-based special access rates. The Commission reaffirmed the establishment and use of a crossover ratio to approximate the cost relationship between voice grade (VG) and DS1 service.[7] That crossover range is to be used, therefore, to aid in the identification of HiCap rates that warrant investigation. The *Strategic Reconsideration Order* provides that rates that fall outside the presumptive range of reasonableness require additional cost justification; in other words, LECs are not foreclosed from demonstrating that such rates are lawful because they reasonably reflect a particular LEC's costs. The Commission concluded that a single range applicable to all carriers is reasonable.

5. Therefore, in light of the Commission's decision in the recent *Strategic Reconsideration Order*, we believe it is appropriate and necessary to to determine what, if any, reasonable cost relationship exists between DS1 and DS3 service and whether DS3 rates should be based on this cost relationship, or alternatively what other method of cost calculation would best ensure that DS3 rates will approximate the cost of DS3 service.

IV. DESIGNATION OF ISSUES TO BE INVESTIGATED

6. Pursuant to the foregoing discussion, the following issues are designated for investigation:

(1) Carriers subject to this investigation are required to supply information and arguments justifying the use of crossover points in establishing DS3 rates.

(a) Is the use of crossover points between DS1 and DS3 service a reasonable basis for establishing rates for DS3 service?

(b) What, if any, cost relationship exists between DS1 and DS3 service?

(c) What cost data or other evidence or information supports the specific crossover points used for establishing the DS3 rates under investigation in this proceeding?

(d) Should a "range of reasonableness" be established in connection with crossover points used for establishing DS3 rates, if the use of such crossover points is found to be a reasonable ratemaking methodology? If so, what is an appropriate range for this purpose?

(2) Those carriers should also discuss the following questions:

(a) What other ratemaking methodologies could be used for purposes of establishing DS3 rates?

(b) With respect to any alternative methodology suggested, how does the methodology ensure that resulting DS3 rates will be based upon carrier costs?

(c) Does that alternate methodology demonstrate that the DS3 rates that are subject to this investigation reasonably approximate the costs of DS3 service?

V. PROCEDURAL REQUIREMENTS

7. This proceeding will be conducted as a notice and comment proceeding to which the procedures set forth in this Order shall apply. Accordingly, we require each carrier which is a party to this proceeding to file a direct case addressing the issues above no later than May 4, 1990. The direct case must specifically address each one of the designated issues, and must supply all information upon which each carrier relies to support its position. Pleadings opposing the direct cases may be filed by interested parties no later than June 1, 1990, and must be captioned "Opposition to Direct Case." Each carrier may file a "Rebuttal" to oppositions no later than June 15, 1990.

8. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, Inc. (ITS), Room 246, 1919 M Street, N.W., Washington, D.C. 20554.

9. *Ex parte* contacts (*i.e.*, written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed, on the same day submitted, with the Secretary for inclusion in the public file. A written summary of oral *ex parte* presentations must be served, on the same day presented, on the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

VI. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 203(c), 201(b), 203(c), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 201(b), 203(c), 204(a), 205, 403, that the issues set forth in this Order ARE DESIGNATED FOR INVESTIGATION.

11. IT IS FURTHER ORDERED that each carrier shall include a response to each item of information requested in Section IV, *supra*, in its direct case.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Cincinnati Bell Telephone Company, *et al.*, CC Docket No. 89-533, DA 89-1483, released Nov. 15, 1989 (Com.Car.Bur.) (*Investigation Order*).

[2] Ameritech Operating Companies, DA 90-134, released Feb. 2, 1990 (Com.Car.Bur.) (*Ameritech Investigation Order*).

[3] *See generally Investigation Order* and *Ameritech Investigation Order*. The petitioners include MCI Telecommunications Corporation (MCI) against CBT Transmittal 535; US Sprint Communications Company Limited Partnership, American Telephone and Telegraph Company and MCI against SNET Transmittal 480; Metropolitan Fiber Systems, Inc., Indiana Digital Access, and Communication Transmission, Inc. against Ameritech Transmittal 401.

[4] *Ameritech Investigation Order* at para. 8.

[5] *Investigation Order* at para. 20.

[6] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, FCC 88-321, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order*), Order On Reconsideration, FCC 89-330, released Jan. 19, 1990 (*Strategic Pricing Reconsideration Order*).

[7] Based on the record evidence presented in the proceeding which led to the *Strategic Pricing Order*, the Commission determined that the crossover point between VG and HiCap services of average length was about six 4-wire VG circuits to one HiCap, and that a reasonable rate range for a HiCap facility is not less than four times or more than eight times the rate for a 4-wire VG circuit of average length. The *Strategic Reconsideration Order* notes that cost relationships may fluctuate and, if necessary, may be adjusted. *Strategic Reconsideration Order* at para. 73 n.52.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Municipality of Anchorage d/b/a
ANCHORAGE TELEPHONE UTILITY

Petition for Waiver of Section 36.125
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: March 16, 1990; Released: March 23, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Municipality of Anchorage d/b/a Anchorage Telephone Utility (ATU) has filed a petition seeking waiver of Section 36.125[1] of the Commission's rules. This rule sets forth the procedures for apportioning Local Switching Equipment, Central Office Category 3 (hereafter Category 3 equipment), between the state and interstate jurisdictions. Section 36.125(f) requires carriers with 50,000 or fewer access lines to apply a weighting factor to increase the Category 3 investment assigned to their interstate operations.[2] ATU, which has more than 50,000 access lines, seeks permission to apply an interstate weighting factor of 2.0. For the reasons discussed below, we deny ATU's petition.

II. BACKGROUND

2. The current procedures for apportioning Category 3 equipment were established by the Commission in the *Separations Conformance Order*[3], which completely revised the rules for allocating costs between the state and interstate jurisdictions effective January 1, 1988. Under these procedures, the prescribed method of allocating Category 3 equipment is dial equipment minutes of use (DEM) for carriers with more than 50,000 access lines and DEM multiplied by the weighting factors set forth in footnote 2 for carriers with 50,000 or fewer access lines.[4] Before this change, the bulk of Category 3 equipment was included in Category 6. Traffic sensitive costs in Category 6 were allocated on the basis of DEM weighted to reflect various types of switching equipment, and nontraffic sensitive costs in Category 6 were allocated on the basis of the subscriber plant factor (SPF). Because the new procedures were expected to cause significant shifts in revenue requirements, the Commission established a transition period from 1988 through 1992 to phase-in the new procedures.

III. SUMMARY OF THE PLEADINGS

3. ATU states that the revised rules for apportioning Category 3 equipment costs will cause a monthly shift in its revenue requirements for local switching equipment from the interstate to the state jurisdiction of $6.24 per access line by 1993. ATU asserts that this shift is approximately 900% of the national average amount, citing 1986 data entered into the record in CC Docket 80-286. ATU contends that it also is experiencing a shift in its revenue requirements to the state jurisdiction because of the transition to a 25% gross allocator for allocating the costs of loop plant, and that the combined impact of these shifts is a monthly increase of $10.60 per access line. ATU argues that this increase is an extraordinary and unfair shift in costs to its local service jurisdiction, and that, absent a waiver, its local service ratepayers will be subject to an "enormous rate shock." ATU states that if it is allowed to use a DEM weighting factor of 2.0 for Category 3 equipment, the combined monthly impact will be reduced to $8.02 per access line. ATU attached to its petition a consultant's study detailing the estimated jurisdictional shifts.

4. Two parties opposed ATU's petition. General Communication, Inc. (GCI), an interexchange carrier providing service between Alaska and the remainder of the United States and overseas points, states that it is concerned by any action that would increase ATU's "already high" interstate costs. GCI notes that the Federal-State Joint Board proceeding in CC Docket 83-1376 is currently addressing proposed changes in the structure of the Alaska telecommunications market, and that a central issue in that proceeding is how the Commission should address the higher costs incurred in providing service in Alaska. GCI also argues that because ATU presently concurs in the exchange access tariff filed by the National Exchange Carriers Association (NECA), any cost shifts will be absorbed by NECA users and will exacerbate the current trend toward increasing costs and declining participation in NECA. GCI asserts that if we grant ATU's petition and ATU later files its own separate access tariff, the increased access costs would be borne by the Alaska interexchange carriers. GCI states that if ATU is allowed to apply the 2.0 weighting factor, a total of $3.5 million in annual cost would be shifted from the state to the interstate jurisdictions by the end of the Category 3 transition period.[5] GCI asserts that the Commission adopted both the weighting factors for companies having 50,000 or fewer access lines and the five year phase-in to minimize adverse impacts upon intrastate revenue requirements. Finally, GCI notes that the Commission has instituted further proceedings in CC Docket 80-286, in which ATU is participating, regarding the allocation of Category 3 equipment,[6] and that the Commission has declined to revise the allocation procedures for small carriers pending the outcome of that proceeding.[7] In light of the above factors, and because the full financial impact of the allocation changes does not fully accrue until 1993, GCI urges the Commission to defer action on ATU's Petition until the Commission rules on the Federal-Joint Joint Board recommendations in the *Category 3 Proceeding*. GCI asserts that ATU should present its arguments about the shift in Category 3 equipment costs in that proceeding.

5. AT&T argues that ATU participated in the lengthy proceedings before the Federal-State Joint Board and the Commission and, through the Alaska Telephone Associ-

ation (ATA), supported the revised Category 3 equipment allocation rules. AT&T asserts that ATU acknowledges in its petition that the weighting scheme provided a "well considered trade off" between a costly plan that would be equitable for all and a simpler plan providing equitable treatment for the vast majority of the industry.[8] AT&T also states that ATU's basic local rates are less than rates in the "lower 48" states, and that ATU presents no evidence that the current allocation procedures produce local rates for ATU's subscribers that are unfair when compared with rates elsewhere. Finally, AT&T notes that if the waiver is granted the burden of paying for certain local switching costs would be shifted from ATU's local ratepayers to other ratepayers, but ATU has not shown that this shift is consistent with the principles underlying the Category 3 equipment allocation rules.

6. In its July 13, 1989 Reply, ATU emphasizes that even if its waiver request is granted, it will still experience a substantial revenue requirement shift to the state jurisdiction of $3.67 per access line per month.[9] ATU also asserts that the comments of GCI and AT&T concerning the anticipated decision in the *Category 3 Proceeding* are irrelevant, because ATU is neither proposing revisions to the overall allocation rules nor requesting a further hearing in that proceeding. Rather, it is seeking a waiver on the merits of its particular situation. ATU also claims that AT&T states incorrectly that ATU supported or participated in the comments of ATA regarding the allocation of Category 3 equipment costs. ATU claims that it participated in that proceeding through the Independent Alliance, and that group consistently supported procedures to include high cost support regardless of company size. ATU contends that the *Tier 2 Companies Cost Support Order* case cited by GCI is irrelevant to its request, because the Bureau was there concerned with proposed shifts *to* the state jurisdiction for a carrier that would have 50,000 lines by the end of the transition. Finally, ATU opposes GCI's suggestion that we defer action on its petition, citing a Bureau decision granting a waiver of Section 36.125(f) during the pendency of the *Category 3 Proceeding*.[10]

IV. DISCUSSION

7. We have considered the facts set forth in ATU's petition and the oppositions thereto, and we deny ATU's petition. ATU has not demonstrated that application of the rules the Joint Board recommended and the Commission adopted would produce a severe hardship for ATU or the ratepayers in ATU territory. Although application of the relevant rule would appear to produce a shift in Category 3 equipment costs that is large in comparison to shifts experienced in other study areas, this shift would not produce local rates that are high in relation to national average rates even if ATU or the Alaska Public Utilities Commission elects to recover all or most of the additional revenue requirement through local exchange service charges.

8. Relevant data show that ATU's local rates are well below the national average rates. First, in a Commission survey of 95 cities,[11] ATU reported that its rate for residential service with the lowest recurring (flat monthly) charge in 1988 was $4.85 (compared to the 95 city average of $6.19).[12] ATU's 1988 single line business service, touch tone, unlimited calling rate was $18.60; only one city reporting this rate had a lower 1988 rate for that service. Second, ATU reported that its connection charge for residential rotary service was $25.50 in 1988. The 95 city 1988 average was $41.29, and only four cities in the survey reported a lower rate than ATU for that service. Also, only six cities included in the survey reported a 1988 single line business connection charge lower than ATU's $34.25; the 95 city average was $66.37. ATU's anticipated jurisdictional shift in Category 3 equipment costs will be added over time to intrastate revenue requirements that are now at a relatively low level. In short, ATU has not shown that separations procedures are now imposing excessive costs on its local service; in fact, those procedures have placed it in a favorable position relative to other companies. The anticipated increase in local costs associated with the new Category 3 equipment allocation simply brings ATU's costs more in line with the costs of other companies.

9. The Joint Board recommended and the Commission adopted the new formula for allocating Category 3 equipment because the Joint Board and the Commission concluded that the new formula would produce more accurate and equitable results. The Joint Board and the Commission clearly understood that the revised procedures would shift costs in varying degrees. The Joint Board devised weighting factors and transition factors that it believed would be sufficient to prevent any undue hardship. The Joint Board expressly rejected a suggestion that it recommend a different separations treatment for Alaska.[13] In these circumstances, a very compelling showing of significant unanticipated hardship would be required to warrant consideration of a waiver request. ATU has not made such a showing.[14]

V. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), that the petition for waiver of Section 36.125 of the Commission's rules filed by The Municipality of Anchorage d/b/a Anchorage Telephone Utility IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. §36.125.

[2] The rule requires carriers with 0-10,000 access lines to apply a weighting factor of 3.0, carriers with 10,001-20,000 access lines a weighting factor of 2.5, carriers with 20,001-50,000 access lines a weighting factor of 2.0, and carriers with more than 50,000 access lines a factor of 1.0.

[3] MTS and WATS Market Structure, Amendment of Part 67 (new Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, 2 FCC Rcd 2639 (1987) (*Separations Conformance Order), recon.*, 3 FCC Rcd 5518 (1988) (*Separations Conformance Reconsideration Order), appeal pending sub nom.* Public Service Commission of the District of Columbia v. FCC, D.C. Cir. No. 88-1771 (filed October 27, 1988).

[4] 47 C.F.R. § 36.125 (c)-(f).

[5] ATU's data indicate that in 1993 the interstate revenue requirements based on a 1.0 DEM weighting factor and a 2.0 DEM factor would be $22,838,765 and $26,344,307 respectively.

[6] When the existing separations procedures for Category 3 equipment were established, the Commission accepted the Joint Board's recommendation to commence additional proceedings addressing the allocation factors for Category 3 equipment. This proceeding is ongoing. *See* Order Inviting Comments and Request for Data, 2 FCC Rcd 3787 (1987) (*Category 3 Proceeding*).

[7] *See Separations Reconsideration Order*, 3 FCC Rcd at 5527. GCI also notes that the Bureau previously denied a request for waiver of Section 36.125(f), citing Commission Requirements for Cost Support Material to be Filed by Tier 2 Companies with 1989 Annual Access Tariffs, 4 FCC Rcd 524 (Com. Car. Bur. 1988) (*Tier 2 Companies Cost Support Order*).

[8] AT&T Comments at 2, citing ATU Petition at Appendix A, p. 2.

[9] It appears that the figure of $4.67 as stated on Page 2 of ATU's Reply is in error. The correct figure as calculated and shown on Page 5 of ATU's Appendix is $3.67.

[10] *See* Kansas State Telephone Co., Petition for Waiver of Sections 36.154 (e)(1) and (2), Sections 36.125 (c) and (f), and the Definition of "Study Area" in Part 36, Subpart H, of the Commission's Rules, 4 FCC Rcd 5505 (Com. Car. Bur. 1989) (*Kansas State Telephone Co. Order*).

[11] *See* Telephone Rates Update, February 3, 1989, prepared by the Industry Analysis Division, Common Carrier Bureau.

[12] From 1983 to 1987, ATU's rate for that service remained constant at $6.75, while the average rate in the 95 cities rose from $5.66 to $6.19.

[13] Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 2 FCC Rcd 2551, 2561 (1987).

[14] Although ATU correctly notes that the Bureau has waived Section 36.125 during the pendency of the *Category 3 Proceeding, the Kansas State Telephone Co. Order* does not support the merits of ATU's petition. The carrier there was granted a temporary waiver so that it did not have to apply the weighting factor during a limited transition period to a larger study area (at which time it would be ineligible to use a weighting factor). In contrast, ATU here seeks permanent waiver of the weighting eligibility criteria to assign additional costs to the interstate jurisdiction.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-82

In re Applications of

VIRGIL L. PEARMAN File No. BPH-871110MK

W & B BROADCASTING, INC. File No. BPH-871110MU

For a Construction Permit for a New FM Station on Channel 278A in Radcliff, Kentucky

Appearances

Stanley G. Emert, Jr. on behalf of Virgil L. Pearman and *Jerrold Miller* and *John S. Neely* on behalf of W & B Broadcasting, Inc.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: March 15, 1990; Released: March 23, 1990

1. The two applications in the caption and one other, now dismissed, were designated for a comparative hearing on March 31, 1989. *Hearing Designation Order*, 4 FCC Rcd 3453 (1989). The following issues will be decided in this decision:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

2. A prehearing conference was held on June 12, 1989 Tr. 1-16, written testimony was exchanged on November 9, 1989, and a hearing session was held November 20, 1989, Tr. 17-157. The record was closed at the end of the day of hearing. *Order*, FCC 89M-2286. Proposed findings of fact and conclusions were filed by both parties on December 27, 1989 and replies were filed on January 10, 1990.

FINDINGS OF FACT

Comparison of the Applicants

Full-time participation in station operation by owners

3. *Virgil L. Pearman* is an individual applicant. Pearman Exh. 1, at 1. He has promised to work full time, 40 hours per week, as the general manager of the station. *Id.*, at 2. He represents that he will control all aspects of the station. *Id.* He has promised to resign from all other employment to fulfill his promise. *Id.*, at 3. Pearman has lived in Radcliff since 1961. *Id.*, at 1. He has participated in the activities of the community. Since 1986 he has been a state senator. *Id.*, at 4. The transcript reflects that Pearman has participated in other activities but they may not be used to improve his comparative position because he failed to reveal them in his integration statement pursuant to the requirements governing this proceeding that all material facts that could influence the outcome of the case were to be revealed in the integration statement. Tr. 9, 10, 25-27.

4. While Pearman has stated that he will give up the work he now performs for the various businesses he owns, he has not made a commitment to resign as president of his two corporations. Tr. 40, 41. But he would resign if his positions interfere with running the station. Tr. 41. He will also continue his paid position as state senator. Tr. 51. In even number years, the legislature meets from January 2 to April 15 in Frankfort, Kentucky. Pearman Exh. 1, at 3. Because Frankfort is 79 miles from Radcliff, Pearman stays in Frankfort from Monday until Friday morning. *Id.*; Tr. 61. He also occupies various legislative committee and subcommittee posts. Tr. 47-8. They meet monthly after the regular session and each committee meets 12-13 times between legislative sessions, usually during weekdays, and each meeting takes about 4 1/2 hours of Pearman's time. Tr. 47-50. Sometimes subcommittees also meet and then Pearman spends the whole day. Tr. 51. Pearman spends 6 or 7 days a month in Frankfort when the legislature is not in session. Tr. 74. There is evidence that from August 1988 to November 1989, Pearman attended 34 committee meetings and that the meetings lasted from just under an hour to 2 1/2 hours. W & B Exh. 7. Sometimes there are special legislative sessions and on Saturdays. Pearman spends 1-3 hours briefing the American Legion. Tr. 61, 62. In addition, Pearman, at times, spends a day answering inquiries from voters. Tr. 53, 87.

5. Pearman testified that he is directly involved in his two corporations, V. L. Pearman Corporation and North Hardin Developers for six to eight hours per week, although some weeks it is only two. Tr. 39. He said, however, that he works 60 to 90 hours a week. Tr. 41, 77. He did say he would arrange his affairs to accommodate the station. Tr. 77.

6. *W & B Broadcasting* is a corporation with two owners. William G. Walters is president, a director, 70% owner, and the proposed general manager of the station. W & B Exh. 1, at 1. He will work full time, 40 hours per week, and as general manager he will supervise and have ultimate responsibility for station operations, policy, personnel, and compliance with regulatory requirements. W & B Exh. 2. Since 1970, Walters has lived in Elizabethtown or Richmond, Kentucky, within the proposed 1 mVm contour. *Id.*, at 1. From 1975 to 1980, Walters was on the board of the Lincoln Trail Area Development District; also during those years he was active in his church and a religious society. *Id.*, at 2. Since 1987, he has participated in Chamber of Commerce activities and rejoined the Lincoln Trail Area Development District. *Id*, at 3. Walters has worked at radio broadcast stations since 1968. *Id.*, at 4.

7. J. Michael Baldwin is the secretary-treasurer, director and 30% owner of the applicant; he proposes to work full time, 40 hours per week, as the station manager. W & B

Exh. 1, at 1; Exh. 3, at 1. He will be in charge of the internal operations of the station; his position will include supervising programming, news, public affairs, engineering, traffic, and business management. W & B Exh. 3, at 1. Baldwin has since 1949, except for four years, resided in Elizabethtown, within the 1 mV/m contour of the proposed station. *Id.* Baldwin has belonged to and participated in Chamber of Commerce activities since 1984, directed a community salute to Fort Knox in 1988, and worked for the Association of the United States Army in 1985, 1986, and 1989. *Id.* He has also in recent years participated in the United Way, Boy Scouts, Little League, PTA, and a religious society. *Id.*, at 3, 4. He has worked at radio broadcast stations for the last 17 years. *Id.*, at 4.

Diversification of control of the media of mass communications

8. Pearman has no media interests. Pearman Exh. 1. W & B operates WASE-FM, Fort Knox, Kentucky which it has promised to divest. W & B Exh. 1, at 1. Walters owns 1% of WEKY-AM in Richmond, Kentucky and he is a member of the board of directors which Walters stated controls the affairs of the corporation. Tr. 126. In its application and its integration statement, W & B represented that it would divest WSAE-FM and that Walters would "divest all interests in other radio stations prior to the commencement of program tests."

Comparative coverage and auxiliary power

9. The applicants stipulated that their comparative coverage proposals provide no decisionally significant difference. Jt. Exh. 1. Both Pearman and W & B will install auxiliary power. Pearman Exh. 1; W & B Exh. 4.

CONCLUSIONS

Comparison of the applicants

Full-time participation in station operation by owners

10. *W & B* is a corporation with two stockholders, both of whom will work full time, 40 hours per week at the station, as managers. William G. Walters will be the general manager and J. Michael Baldwin will be the station manager. They currently operate a local station, which they are going to divest, where they occupy the same positions.

11. *Virgil Pearman* is an individual applicant and he proposes to work full time as the general manager. His quantitative integration is diluted, however, by his obligations to perform the duties of state senator. Mr. Pearman has been a senator since 1986 and he stated that he intends to continue in that office. When management is not going to be rendered on a full-time, day-to-day basis, the credit given drops sharply, to the extent time spent moves away from full time. *Metro Broadcasting, Inc.*, 99 F.C.C.2d 688, 701 (Rev. Bd 1984) (*Citing, Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 395 (1965).) In even numbered years Mr. Pearman will spend each week in Frankfort, Kentucky from January 2 to April 15 when the legislature is in session. Frankfort is 79 miles from Radcliff. Pearman also serves on a number of legislative committees and subcommittees. These committees, Pearman represents, meet 12-13 times between legislative sessions and often subcommittees meet on the same day. Pearman concedes he spends 6-7 workdays a month in Frankfort when the legislature is not in session. Records of the legislature show that committee meetings which Pearman attended happen more frequently. For example, during the fifteen month period from August 1988 to November 1989, he attended not 12-13 meetings, but 34. Mr. Pearman also concedes that he frequently spends entire days answering voter questions. He meets every week with the American Legion. He claims that he only spends 6-8 hours a week on his family-run businesses but that he works 60 to 90 hours a week. His only other full-time occupation is as a state senator. While Mr. Pearman stated that he would arrange his affairs to accommodate the station, he has offered no plan for accomplishing legislative duties that already occupy him full time and require that 3 1/2 months every other year he be away from Radcliff and every intervening month that he be gone 6-7 days. There is also the significant time he spends on constituent demands. While he has additionally promised to arrange to free himself from the family corporations which he founded and heads, he does not intend to relinquish his leadership in these companies.

12. While W & B is entitled to full time credit for integration, Pearman is realistically only entitled to part-time credit. It appears that when the legislature is not in session, Pearman will spend no more than half the month at the station on a day-to-day basis. While this difference makes the qualitative attributes of the applicants comparatively insignificant, if the differences were assessed the outcome would remain the same.

13. Pearman and W & B's owners both live in the service area and both have participated in civic affairs. However, W & B's owners have substantial broadcast experience and, therefore, W & B is to be favored over Pearman on qualitative grounds.

Diversification of control of the media of mass communications

14. Pearman has no media interests. While W & B and its stockholder, William Walters, have interests in broadcast stations, they promised when W & B's application was filed that they would divest "all interests" before program test authority. That promise was repeated in the integration statement and in the written testimony. Pearman suggests that Walters' position as a director of a station is not included in that promise. There is no reason to assume that he did not intend to divest his director position since everyone understands that a director who makes decisions about a station has a recognizable interest. Walters has said he will divest all his interests. On the diversification criterion, the applicants are equal.

15. W & B's integration proposal is comparatively better on both quantitative and qualitative grounds than Pearman's proposal. Because there are no other differences between the applicants, W & B will receive the grant.

Petition to Reopen the Record

16. W & B petitions to reopen the record to include Pearman's announcement that he will run to retain his senator's position. The record already reflects that he intended to continue as a senator and, therefore, the material would be repetitive. W & B's request will be denied.

ACCORDINGLY, IT IS ORDERED that the petition to reopen the record, filed January 31, 1990 by W & B Broadcasting, Inc. IS DENIED.

IT IS FURTHER ORDERED that the application of Virgil L. Pearman (File No. BPH-871110MK) IS DENIED and that the application of W & B Broadcasting, Inc. (File No. BPH-871110MU) for a new commercial FM station to operate on Channel 278A at Radcliff, Kentucky IS GRANTED provided the applicant and its stockholders divest all mass media interests before they seek program test authority.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Seciton 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements for Cost Support Material To Be Filed with 1990 Annual Access Tariffs

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1990; Released: March 14, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 26, 1990, this Bureau released an Order in the above-captioned proceeding to establish the Tariff Review Plan (TRP) guidelines for annual access tariff filings to be made by local exchange carriers (LECs) on April 2, 1990.[1] The *1990 TRP Order* discussed the history of our TRP use, provided TRP formats for Tier 1 and Tier 2 companies, defined terms, described changes, and set a calendar for the access tariff proceeding. It noted that we strongly discourage carriers' reliance on errata, and set March 5, 1990, as the filing date for any waiver requests. It also made reference to previous TRP Orders and to the *1989 Waiver Order*.[2]

2. In response to the *1990 TRP Order*, waiver requests were filed by ALLTEL Illinois, Inc. (Alltel), the Bell Atlantic telephone companies (Bell Atlantic), Central Telephone Company (Centel), Chillicothe Telephone Company (Chillicothe), Citizens Telephone Company (Citizens), GVNW Inc./Management (GVNW), Illinois Consolidated Telephone Company (Illinois Consolidated), Lincoln Telephone and Telegraph Company (Lincoln), Lufkin-Conroe Telephone Exchange, Inc. (LTX), Nevada Bell, New England Telephone and Telegraph Company and New York Telephone Company (NYNEX), Pacific Bell, Rochester Telephone Corporation (Rochester), Roseville Telephone Company (Roseville), Southwestern Bell Telephone Company (SWB), Telephone Utilities Exchange Carrier Association (TUECA), United Telephone System (United), Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West), and Virgin Islands Telephone Corporation (Vitelco). An opposition was filed by American Telephone and Telegraph Company (AT&T), and comments were filed by the BellSouth Telephone Companies (BellSouth).

3. In this Order we address all the waiver requests. Several carriers request continuation of currently effective waivers. These requests are unopposed, and are granted.[3]

II. ISSUES

A. *Mechanized Filing*

4. Alltel, Centel, Chillicothe, Citizens, GVNW, Illinois, LTX, Roseville, TUECA, and Vitelco request waiver of the requirement that TRPs be filed in mechanized format. These carriers note the short schedule and lack of forewarning, their limited resources, and the dearth of any standard or uniform diskette or program, in stating that it would be overly burdensome, or even impossible, for them to comply with this requirement. This request is unopposed, and is granted.

B. *EACR*

5. Nevada Bell, NYNEX, and Pacific Bell request a waiver to allow them to incorporate new rate structures to recover Equal Access Cost Recovery (EACR) costs through their local switching rates rather than recovering them, as they do now, through a separate access rate element. This request is opposed by AT&T, which notes that this change would make it more difficult for the Commission and interested parties to identify and track equal access costs, and thus to determine whether the carriers' proposed rates are just and reasonable. Section 69.3(a) of the Commission's Rules, 47 C.F.R. § 69.3(a), limits annual filings to changes in rate levels only. We are not persuaded that any of these carriers has shown good cause why that limitation should be waived for the April 2, 1990; annual access tariff filing. Accordingly, these waiver requests are denied. This denial does not preclude these carriers from filing their proposed equal access cost recovery changes in separate transmittals at a later date.

C. *Split Filing*

6. Four carriers note the inherent difficulties involved in the filing of rates for the period July 1, 1990, to June 30, 1991, when that period consists of two half years that are in different monitoring periods and will incorporate different separations rules.[4] Lincoln requests permission to file, on April 2, two separate sets of access tariff rates, each to be effective for six months.[5] Each would be based on six months' cost and demand data.[6] United proposes a similar filing plan, except that United would file its July-to-December 1990 rates on April 2, 1990, and its January-to-June 1991 rates at a later date.[7] Bell Atlantic and NYNEX propose to file on April second a full year's access rates, based on a full year's test period, but to exclude from their calculations any reference to the separations changes. Bell Atlantic and NYNEX would then file at a later date rate modifications to be effective January 1, 1991, to reflect these changes.

7. These carriers argue that the incorporation now of the January 1, 1991, separations changes will produce misleading rate of return reports for both the final two quarters of 1990, when revenues will be lower than actual 1990 revenue requirement, and the first two quarters of 1991, when revenues will be higher than the actual requirement.[8] These carriers express concern that, absent some sort of "split" filing, they will suffer underearnings at the end of the first six-month period and overearnings at the end of the second six-month period.[9] These earnings disparities will not be averaged and will not offset each other, these carriers assert, because they fall in different monitoring periods.[10]

8. These requests are opposed by AT&T, which argues that the 12-month period is necessary and appropriate, and that use of a full year test period will allow the LECs to net out seasonal and other factors which might otherwise distort the rates.[11] AT&T states that, in view of the Commission's announcement that price caps will be instituted for LECs beginning January 1, 1991, it is particularly important that the July 1 rates be full-year rates. BellSouth comments that if these four waiver requests are granted, this approach should be extended to apply to all LECs filing on April 2.

9. These four carriers have not demonstrated that application of the rules will affect them differently from other carriers that file access tariffs. Nor have these petitioners demonstrated that the interaction of the July-June access year with calendar year separations changes and the two year monitoring period will produce results that will not recur for as long as this combination of rules remains in effect. This waiver request is accordingly inconsistent with the principle that "the very essence of waiver is the assumed validity of the general rule."[12] Therefore, these requests are denied.

D. ***Inside Wiring***

10. Rochester and Nevada request waiver of the requirement that inside wire (ISW) and settlement expenses be excluded from the entries on Chart COS-2 for "Expenses less Depreciation." Rochester indicates that its 1989 TRP data contained ISW and settlement expenses for both historical and prospective periods, and states that it will also provide these expenses in the 1990 TRP for all periods. However, for the previous years, Rochester asserts, it would have to reconstruct its cost studies to determine the adjustments needed to exclude the ISW and settlement expenses. Rochester claims that such studies would be onerous and costly in view of the short time available before the April 2 deadline. Nevada states that it can remove the settlements as required, but that ISW expenses, which appear in several Account 6362 subaccounts, cannot be removed except by using field reporting code data that are not readily available. Nevada therefore requests waiver of this requirement. These waiver requests are unopposed.

11. We note Rochester's acknowlegement of our concern stemming from the inconsistent treatment of settlement and ISW expenses when carriers report their historical and prospective data. We grant both Rochester's and Nevada's waiver requests on this matter, to the extent that their historical data are consistent with their prospective data in this regard. If we find, upon examining the April 2 filings, that this consistency is absent, these waivers will be revoked.

E. ***DS3 and ICB***

12. SWB requests a waiver of the requirement for Chart DMD-4 to provide circuits, channel terminations, and channel mileage demand data for all special access services, including DS3 services. SWB indicates that DS3 and DS3-equivalent services are completely distance sensitive and do not have separate identifiable rates for channel termination and channel mileage. However, SWB states, it can provide circuit information.[13] SWB also requests a waiver of the requirement of Chart RTE-2 to provide rate and revenue comparison data for special access and DS3 services. SWB indicates that it does not have a 0 mileage band as requested on the chart, but can provide data based on 1-mile and 10-mile mileage bands. Finally, SWB requests exclusion of columns A, B, C, E, and F for the optical DIM rate category for Chart RTE-2, since these services were provided on an individual case basis prior to January 17, 1990. SWB's waiver request is unopposed. We find that SWB has presented good cause why its waiver request should be granted, and has proposed acceptable means of providing necessary and usable data. SWB's waiver request is therefore granted.

F. ***NRC Rate Structure***

13. Bell Atlantic seeks permission to include in its annual access tariff filing the incorporation of a nonrecurring charge (NRC) rate structure for Special Access. Bell Atlantic notes that it made such a change in last year's annual filing with regard to Switched Access, and stated then that it proposed a similar change for Special Access assuming a positive experience with Switched. Bell Atlantic's request is unopposed.

14. Although we allowed Bell Atlantic to make a structural change in last year's annual access filing, we believe that as a general rule, Section 69.3 of the Commission's Rules, which states that annual access filings will include only rate level changes, should be honored. Accordingly, Bell Atlantic's request is denied.

15. Centel also requests a waiver to allow it to include certain NRC rate structure changes in its annual filing. This request is unopposed. Centel has explained neither its proposed rate structure changes nor their impact, and has shown no good cause why a waiver should be granted. Accordingly, Centel's waiver request is denied.

G. ***Aggregation***

16. Both Pacific and Nevada request waiver of the requirement that Chart RTE-4 data be filed at a "tariff entity" level rather than a "study area" level. Both state that their data are developed and filed at a study area (state) level rather than at a tariff entity (holding company) level. The requirements regarding Chart RTE-4 are set forth in part D., paragraph 17 (4) of the *1990 TRP Order*. That order stated that "each holding company shall create one chart for all its companies . . . ." What we anticipated, however, is what Nevada and Pacific request; *i.e.*, that these data be provided at a study area level. Perhaps our requirement would be more clearly stated as "each holding company shall create one chart for *each of* its companies . . . . " In any case, no waiver is necessary in order for Nevada and Pacific to complete their RTE-4 charts as they propose.

17. SWB requests a waiver of the requirements of Chart COS-7 for the aggregation of data to the tariff entity level. SWB argues that this requirement is inconsistent with other provisions of the *1990 TRP Order* that indicate that the data and format required for Chart COS-7 and Automated Reporting and Monitoring Information System (ARMIS) Report 43-04 are the same.[14] SWB's request is unopposed. SWB has failed to distinguish between historical data and prospective data. We indicated in the *1990 TRP Order* that the ARMIS Report 43-04 data would meet the requirements of Chart COS-7(H) because these data are "substantially the same" and provide "adequate historical financial information." *1990 TRP Order* at para. 13. We also stated that we were adopting the formats of ARMIS Reports 43-03 and 43-04 for the provision of detailed prospective (test year) cost data. *Id.* Thus it

should be clear that, while the ARMIS data are sufficient to meet the requirements of Chart COS-7(H), it is the ARMIS *format* only that is being adopted for Chart COS-7(P). We clearly directed, in para. 40 of the *1990 TRP Order*, that the prospective data must be aggregated to the tariff entity level. SWB has failed to demonstrate good cause why this requirement should be waived, and its request is accordingly denied.[15]

H. *Types, Amounts, Detail Levels of Data Required*

18. Alltel requests a waiver of the requirement of Carrier Common Line (CCL) data for the Tier 2 Chart DMD-1. Alltel indicates that its account 5080 Interstate Access Revenues is not booked by originating, terminating, premium, and non-premium categories as requested on Chart T2DMD-1. Alltel contends that CCL demand data are not required from carriers in the National Exchange Carrier Association (NECA) Common Line (CL) pool in other areas of the TRP, and argues that such carriers should be exempted from that requirement here as well. This request is unopposed. We are persuaded that Alltel has shown good cause, and this waiver request is accordingly granted. Alltel also requests modification of the Special Access inter-office mileage section on Chart T2REV-1. Alltel suggests that line items should be added to take into account the Tier 2 measure, channel mileage termination and channel mileage facility rate, to eliminate the need for footnotes. (Mileage bands are the T1 companies' measure of use.) We accept Alltel's rationale and proposed data provision in this regard, and this waiver request is accordingly granted.

19. Chillicothe requests a waiver of our requirement that it provide January-December 1989 data for its Past Year Cost of Service (PYCOS) study. Chillicothe proposes instead to provide January-December 1988 data, as its 1989 data are subject to an ongoing audit. Chillicothe submits that, under the circumstances, it believes that its 1988 audited data are more likely to be reliable. Chillicothe's request is unopposed. We are not persuaded, however, that the use of audited, year-old data is preferable to the use of 1989 data. Chillicothe's request is therefore denied.

20. Illinois Consolidated requests a waiver of the requirement that it file Chart T2SEP-1, stating that the burden of preparing this chart would be overwhelming. Illinois Consolidated states that the purpose of Chart T2SEP-1 is to identify the change in revenue due to the introduction of new basic studies, but that Illinois Consolidated, as an annual cost study company, does not characteristically introduce new basic studies during the prospective period. This request is unopposed. Illinois Consolidated has apparently misunderstood the T2SEP-1 requirement, since, if Illinois Consolidated is not introducing prospective studies, it need only complete the chart by use of zeroes. No waiver is therefore needed, and Illinois Consolidated's request is dismissed.

21. Lincoln requests a waiver of the requirement to provide numerous line items pertaining to local and state revenue forecasts associated with Charts COS-1(P) and COS-7(P). Lincoln indicates that this information is not required by its state or local regulatory bodies, that it has never developed this information, and that it does not routinely forecast revenues for services other than interstate access. Lincoln's request is unopposed. We refer Lincoln to the attachments to this Order, which clarify (through the use of "N/A" entries) the data requirements Lincoln discusses. To the extent that these attachments characterize the relevant data submissions as unnecessary, no waiver is needed. Whenever the forms indicate that data should be filed, however, it is expected that Lincoln will provide the required data, having shown no good cause why it should be excepted from the requirement. Lincoln's request is therefore dismissed in part, and otherwise denied.

22. LTX requests waiver of certain requirements of Chart T2SEP-1, proposing to include only Traffic Sensitive (TS) data, and to leave other columns (BFP, payphone, ISW) blank. This request is unopposed. LTX has shown good cause for its request, and its waiver is accordingly granted.

23. Nevada Bell requests a waiver of the level of detail required in Charts COS-6(P) and COS-7(P). Nevada Bell states that the TRP requires data in greater detail than Nevada Bell prepares, and proposes to leave blank certain responses in these charts, providing only the data required in Chart COS-1. Nevada Bell states that in providing Chart COS-1 data it is in full compliance with the Commission's Rules. Pacific Bell too requests a waiver of the data requirements of form COS-7, or an extension of time to comply. These requests are opposed by AT&T, which states that the data these carriers seek to omit are necessary, that their provision imposes no particular burden on these carriers, and that the arguments made here are identical to arguments we rejected in a previous Order.[16] AT&T also argues that the data required for inclusion in these charts are similar to the data required for the ARMIS reports.

24. The level of detail required in Charts COS-6(P) and COS-7(P) is made very clear in our *1990 TRP Order*, and was introduced in last year's proceeding. *See 1989 TRP Order*, 4 FCC Rcd at 1664-65; *1989 Waiver Order*, 4 FCC Rcd at 416-17. Neither Nevada Bell nor Pacific Bell has shown good cause why it should be excepted from these requirements, and their waiver requests are accordingly denied.

25. Rochester requests a waiver of the requirement for five of its companies that are average schedule companies to provide historical cost information specified in pages 2, 3, and 4 of Chart T2COS-2.[17] We note that footnote one on Chart T2COS-2 of the TRP states: Companies need fill out this chart only for those periods for which they have previously forecast. Accordingly, no waiver is required, and Rochester's request is dismissed.

26. United requests a waiver of the requirement of Chart DMD-4 to provide special access demand data by month, beginning with January 1987, and states that it can provide monthly data only from July 1987. United indicates that in the *1988 TRP Order*, at para. 12, the Bureau directed carriers to start keeping certain special access demand data beginning with July 1987. United's waiver request is unopposed. We believe that United's provision of quarterly data from July 1987 will be sufficient to enable us to evaluate its tariff, and that United has shown good cause why its waiver should be allowed. United's request is accordingly granted.[18]

27. US West requests, by letter, a waiver of the data requirements of Charts COS-1(P), COS-6(P), and COS-7(P) to the extent that these charts would require US West to create numbers arbitrarily. US West does not specify the data entries it seeks to omit, but states only that it will enter "N/A" as it finds appropriate.[19] US West's request is unopposed. We refer US West to the attachments to this

Order, which clarify our intentions regarding the use of "N/A" responses. To the extent that these attachments allow the use of an "N/A" response, no waiver is required. If a response is required by these charts, however, no exception will be allowed US West. We are not persuaded that US West has shown good cause why the requirements of Charts COS-1(P), COS-6(P), and COS-7(P) should be waived, and accordingly US West's request is dismissed in part, and otherwise denied.

III. ORDERING CLAUSE

28. Accordingly, IT IS ORDERED that the waiver requests of the local exchange carriers ARE GRANTED to the extent discussed herein, and ARE OTHERWISE DISMISSED OR DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Commission Requirements for Cost Support Material To Be Filed with 1990 Annual Access Tariffs, Order, DA 90-274, released Feb. 26, 1990 (Com.Car. Bur.) (*1990 TRP Order*).

[2] *See, e.g.*, Commission Requirements for Cost Support Material To Be Filed with 1989 Annual Access Tariffs, Order, DA 88-1554, released Oct. 3, 1988 (Com.Car.Bur.) (*1989 TRP Order*); Annual 1989 Access Tariff Filings, Memorandum Opinion and Order, 4 FCC Rcd 413 (Com.Car.Bur. 1988) (*1989 Waiver Order*).

[3] As we did in last year's Waiver Order, we are granting continuation of currently effective waivers based upon our prior finding that they are justified. *1989 Waiver Order*, 4 FCC Rcd at 413. We stated there that certain waiver requests that have been submitted for each of the last several years, including the $25 special access surcharge, the information surcharge, and the calculation of message unit credits, have been granted on a continuing basis, and that carriers need not annually seek their further continuation. *Id.* at 413-14. It should be noted, however, that this Order's granting of waiver requests other than the continuation of currently effective waivers is made only to the requesting carrier, and is not extended to other carriers.

[4] The carriers refer to significant changes in Part 32 and Part 36 of the Rules, which will become effective January 1, 1991. These changes include the 1991 amortization schedule of inside wire, the transition of the Subscriber Plant Factor to the 25 percent Base Allocation Factor, and the 1991 switching equipment allocator change.

[5] The first set of rates would be effective July 1 through December 31, 1990, and would exclude separations changes. The other would be effective January 1 through June 30, 1991, and would include these changes. Lincoln requests permission to average the two sets of rates when appropriate in populating the proposed rates on Charts RTE-1 through RTE-4 and REV-1.

[6] Lincoln notes that, in keeping with the requirements of the *1990 TRP Order*, it will thus provide access charge rates in its April 2, 1990, filing for the entire access period of July 1, 1990, through June 30, 1991.

[7] United requests a waiver of the Section 61.38(b)(1) requirement that access rate revisions be based on representative 12-month forecasts of costs and demand.

[8] United, for example, explains that the separation changes would cause its July-through-December data to reflect interstate costs that the artificially low access rates would not recover, so United would not earn the authorized rate of return for the first six-month period. For the second six-month period, United contends, the opposite would result. United indicates that, absent this waiver, it will face an unrecoverable revenue shortfall of about $17 million for the July-December 1990 period. United notes further that its demand generally grows more rapidly than its costs, so the rate needed to earn the authorized rate of return for July-December 1990 would be higher than the rate needed to earn the same return for January-June 1991.

[9] NYNEX indicates that for the period July through December 1990, its rates and revenues will be $12 million lower than actual costs, and its rate of return will fall below the targeted 12 percent, while for January through June 1991, rates and revenues will be above costs, and the rate of return will be above the targeted 12 percent. Additionally, NYNEX asserts that if price cap regulation is implemented on January 1, 1991, for local exchange carriers, NYNEX will have no way of recovering the $12 million shortfall it will experience for 1990. For a description of the Commission's proposed price cap plan, *see* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Supplemental Notice of Proposed Rule Making, FCC 90-89, released Mar. 12, 1990, at paras. 15-22.

[10] The current two-year monitoring period ends December 31, 1990.

[11] AT&T does not differentiate the Bell Atlantic and NYNEX requests, which are based on use of a full year test period, with rates to be modified later, but characterizes all four carriers as requesting a six-month data period. AT&T also does not address the carriers' argument that the spanning of two monitoring periods will preclude their netting out these underearnings and overearnings.

[12] *Wait Radio v. FCC*, 418 F. 2d 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[13] SWB requests permission to add to Chart DMD-4 new columns to include the following rate categories for DS3 services: premises-to-premises electrical, premises-to-hub central office electrical, and premises-to-premises or premises-to-hub central office optical (DIM). SWB also proposes to add these categories to Chart RTE-2. SWB says that this format more closely parallels the DS3 and DS3-equivalent rate structure, and proposes to provide these data as a supplement to the standard TRP charts.

[14] SWB asserts that it has had no reason to aggregate data on a tariff entity level because ARMIS Report 43-04 requires reporting on a study area basis only. Further, SWB claims, the factors and percentages used to allocate investment and expenses, which are study area specific, have no validity on an aggregated basis, and are not required, in Part 36 and Part 69 cost allocation processes, to be aggregated. SWB cites paragraph 42 of the *1989 TRP Order* for the proposition that filing data on an aggregated basis for Charts COS-6, COS-7, and COS-8 would be inappropriate.

[15] There is nothing in our Order that requires the aggregation of factors and percentages, as SWB apparently suggests, and accordingly this part of SWB's request for waiver is dismissed.

[16] AT&T cites Annual 1989 Access Tariff Filings Petitions for Waiver and Petition for Reconsideration, Memorandum Opinion and Order, DA 88-1872 (Com.Car.Bur.) (released Dec. 2, 1988), at para. 37.

[17] These five telephone companies are Thornton, Canton, Breezewood, Enterprise, and Lakewood. Rochester indicates that these companies do not have cost information for 1987 and 1988 and did not prepare a cost forecast for the 1989 TRP. However, they can provide historical data for calendar 1989 and prospective data for the test year as required in the 1990 TRP, Rochester states.

[18] We note that United's 1989 access tariff filing also omitted the requested data for January-June of 1987, but without benefit of a waiver. We commend United's decision to comport with our requirements in this year's proceeding.

[19] US West also notes that it does not seek to extend the use of the "N/A" response beyond what it used in the last annual access tariff filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-133

In the Matter of

Amendment of Parts 2 and 80 of the Commission's Rules regarding revision of the high frequency (HF) channels for the maritime mobile service to implement the Final Acts of the World Administrative Radio Conference for the Mobile Services, Geneva, 1987.

NOTICE OF PROPOSED RULE MAKING

Adopted: March 8, 1990; Released: March 20, 1990

By the Commission: Commissioner Duggan not participating.

I. INTRODUCTION

1. This proceeding continues the implementation of the Final Acts of the 1987 World Administrative Radio Conference for Mobile Services (1987 Mobile WARC) into the Commission's Rules. The 1987 Mobile WARC substantially revised the high frequency bands between 4000-27500 kHz (HF bands) that are allocated exclusively to the maritime mobile service. Internationally, these changes will become effective on July 1, 1991, and will affect every licensed ship and coast station worldwide that operates in the HF bands.

II. BACKGROUND

2. The 1987 Mobile WARC, held in Geneva from September 14 to October 17, 1987, was broad in scope. It reviewed and revised the international Radio Regulations concerning the mobile services, the mobile satellite services, and the radionavigation and radiodetermination satellite services. It also made substantial modifications to the maritime mobile HF bands and revisions to implement the Global Maritime Distress and Safety System (GMDSS).

3. Because of the magnitude of the revisions to the Radio Regulations, we are implementing the changes to the Commission's Rules through three rule making proceedings.[1] The first proceeding addressed the requirements that entered into force on October 3, 1989.[2] This, the second rule making proceeding, addresses those revisions that pertain to the maritime mobile HF bands. The final proceeding will implement the GMDSS into the maritime mobile service rules.[3]

4. A major task of the 1987 Mobile WARC was to rearrange the channelling of the maritime mobile HF bands, which had not been reviewed since 1974, and to incorporate the new bands that had been allocated for the maritime mobile service by the 1979 World Administrative Radio Conference. The objective was to permit the new spectrum to be used for the newer forms of maritime mobile systems and expand the capabilities of existing systems. Consequently, the revisions reflect an increase in frequency spectrum for automated digital selective calling (DSC), narrow-band direct-printing (NBDP), and radiotelephony (voice), and a decrease in frequency spectrum for manual Morse code telegraphy. The existing channels for these services also were rearranged to accommodate the new channelling scheme. Additionally, the amount of spectrum allocated for coast station wideband telegraphy was preserved without reduction but the allocation was shifted slightly in frequency.

5. These revisions will take effect internationally at 0001 hours Coordinated Universal Time (UTC) on July 1, 1991. Except for coast stations operating in the coast wideband spectrum, every existing maritime station, coast and ship, public and private, operating in the HF bands will have to change frequency. To enact these changes, we propose to reflect the requirements adopted internationally in 47 C.F.R. § 2.106, Table of Frequency Allocations, and the frequency tables contained in 47 C.F.R. Part 80, Stations in the Maritime Services. In this Notice, we also propose procedures for modification of licenses, notification of ship and coast station operators, transfer of operating frequencies, and the application process for new frequency assignments.

III. DISCUSSION

6. *Changes to the HF maritime frequencies.* The 1987 Mobile WARC frequency revisions in the maritime HF bands (4000-27500 kHz) are extensive. Before discussing the more complex changes, we will summarize those proposed amendments that represent simple table revisions, direct substitution of frequencies, or extension of existing frequency tables. These amendments should present little controversy but are necessary to conform to international regulations.

7. First, we propose to revise the Table of Frequency Allocations (47 C.F.R. § 2.106) to reflect changes in international footnotes. We also propose new frequency tables for NBDP in 47 C.F.R. § 80.361(a) and (b) to reflect the changes in existing NBDP frequencies and to incorporate an additional 200 duplex frequencies and 153 simplex frequencies.[4] Although the distress and safety system will be addressed at length in the next 1987 Mobile WARC implementation proceeding concerning the GMDSS, we propose to update all rules containing HF distress and safety frequencies at this time. Consequently, we propose to amend the distress and safety frequencies for DSC and radiotelephony, 47 C.F.R. §§ 80.359(b) and § 80.369(b), respectively, and to add a new paragraph for NBDP, 47 C.F.R. § 80.361(c). Further, we propose to amend 47 C.F.R. § 80.371(d) to reflect changes in the radiotelephony frequencies used on the Mississippi River. We also propose to replace six frequencies in 47 C.F.R. § 80.373(i) that are used for private simplex communications in Alaska. Finally, we propose to revise the table of business and operational frequencies in 47 C.F.R. § 80.373(c). The existing frequencies are changed and two new frequencies are added.

8. Turning to frequency changes of a more complex nature, the 1987 Mobile WARC reduced the number of ship station frequencies available for Morse code telegra-

phy by approximately 50 percent. The proposed amendments for 47 C.F.R. §§ 80.355(c) and 80.357(a) contain these changes. Although we maintained 62 Channel Series in 47 C.F.R. § 80.357(a), the number of frequencies per Channel Series has been reduced and individual frequencies have been repeated several times. To offset this reduction, the 1987 Mobile WARC provided that certain NBDP frequencies also could be used for Morse code telegraphy by ship stations. Hence, we propose to amend 47 C.F.R. § 80.357(a)(3) to allow ships to use specified non-paired NBDP frequencies when the frequencies allocated for ship Morse code telegraphy are not adequate for communications.

9. We also propose to amend 47 C.F.R. § 80.357(b) to implement the minor changes made by the 1987 Mobile WARC to the coast station frequencies for Morse code telegraphy.[5] The 1987 Mobile WARC also provided new spectrum in the 19 and 26 MHz bands, 19705-19755 kHz and 26122.5-26145 kHz, for coast station Morse telegraphy, wideband telegraphy, facsimile, and special transmission systems. Because there are no 18 MHz band frequencies available for ship station Morse code telegraphy that would correspond with the 19 MHz band coast frequencies, we propose to add frequencies for coast station Morse code telegraphy at 26 MHz only. Further, all the available spectrum is not needed for Morse code telegraphy because it has limited daily and seasonal use due to propagation effects and there are currently only 14 licensed public coast stations operating HF Morse code telegraphy. Of the 22.5 kilohertz of spectrum allocated in the 26 MHz band for coast stations, we propose to use 4.4 kilohertz for Morse code telegraphy.[6] Consequently, we propose to add 11 frequencies in the 26122.5-26126.9 kHz band to 47 C.F.R. § 80.357(b) for coast stations working Morse code telegraphy. We will not address the 19 MHz band or the remaining 26 MHz band spectrum at this time.

10. Internationally, the working frequencies for ship stations equipped to use wideband telegraphy, facsimile, and special transmission systems were reallocated and spaced 4 kHz apart. Individual countries, however, may assign frequencies with a different channelling arrangement to meet the needs of specific systems.[7] The Commission's Rules, 47 C.F.R. § 2.106, footnote US296, and § 80.363(a), currently contain 2 sets of ship frequencies for facsimile based on 4 kHz spacing. Considering that the authorized bandwidth for ship and coast stations operating facsimile is 3 kHz, 47 C.F.R. § 80.205(a), we propose to adjust the ship frequencies for facsimile to reflect the band reallocation using a 3 kHz channel spacing.[8] We believe that a 3 kHz channelling plan will use the spectrum more efficiently. Our records indicate that no non-government ship assignments for facsimile have been made on the existing frequencies although extensive use of these bands is made by the government agencies for wideband purposes.[9] Further, the Commission's Rules already permit frequencies in the 2000-27500 kHz band to be assigned to coast stations for facsimile.[10] We propose to amend 47 C.F.R. § 80.363(b) to add the particular bands where coast facsimile is permitted internationally. Because of the expansion of facsimile in the work place generally, we believe that operational use in the maritime mobile service would be facilitated if specific bands were identified. We ask for comments on our proposals to denote frequencies for ship facsimile based on a 3 kHz channel spacing and to specify the bands for coast facsimile in accordance with international provisions. We also request information on the industry's need for facsimile generally.

11. Turning to an area where the 1987 Mobile WARC expanded the available spectrum, the number of HF frequencies that were allocated for DSC tripled. Therefore, we propose to replace the frequency table in 47 C.F.R. § 80.359(a) with three tables: a "Worldwide" table, an "Atlantic" table, and a "Pacific" table. Although only the frequencies proposed for worldwide use are specifically paired under international regulations, we propose to pair the frequencies in all three tables and make them available to public coast stations. We expect the majority of DSC communications will be with public coast stations using paired frequencies. We also note that DSC is a new method of automated calling. As a new system, we do not wish to limit the implementation of DSC by restricting assignments beyond proposing the three tables with broad geographic terms. Consequently, operators should be aware that these frequencies will be shared internationally among public coast stations and government users. We request comments on the three tables proposed, the pairing of all frequencies, the needs of private coast stations, and the potential for sharing DSC frequencies.

12. Another area where the 1987 Mobile WARC provided for an increase in spectrum was radiotelephony (voice). In addition to revising the channelling plans for the radiotelephony duplex frequencies (*i.e.*, public correspondence) based on 3 kHz spacing, the 1987 Mobile WARC allocated an additional 70 frequency pairs for duplex operations.[11] Before these additional frequencies can be assigned by administrations, however, they must be added to the worldwide allotment plan in Appendix 25 of the Radio Regulations. The International Frequency Registration Board (IFRB) is currently reviewing each country's request.[12] The IFRB is scheduled to issue an initial allotment plan in October, 1990, and a final allotment plan on July 1, 1991. Because we do not know the exact allotments permitted the United States at present, we propose two tables of frequencies in 47 C.F.R. § 80.371(b) for public correspondence: Table A contains the new frequencies to which existing stations must transfer, and Table B is reserved for additional frequencies which may be allotted to the United States once the international review is concluded. In this manner, we will be in a better position to distribute any frequencies allotted internationally. Comments should address the needs of the industry as a whole. We particularly request information such as, frequency usage by channel and location, that would assist us in deciding how best to distribute the additional allotments equitably. The parties should recognize, however, that the United States will not necessarily obtain approval from the IFRB for use of any of these additional frequencies.[13]

13. In addition to the 70 new duplex frequencies allocated for radio-telephony, 24 frequencies were added internationally for simplex operations.[14] We propose to make available two new frequencies at 4 MHz and 6 MHz (one in each band) for business and operational use under 47 C.F.R. § 80.373(c). The short range 4 MHz and 6 MHz frequencies could augment the current business and operational frequencies that are in heavy demand. The remaining 22 frequencies are between 12 MHz and 25 MHz and typically provide longer range service for the high seas. Consequently, we propose to make these simplex frequencies available for public correspondence in 47

C.F.R. § 80.371(b)(3). Coast station applicants would be limited to 1 kW peak envelope power (PEP) and required to justify using simplex rather than duplex radiotelephony frequencies for public correspondence. Applicants should be aware that these simplex frequencies, unlike the duplex frequencies, would not be protected internationally.[15] Further, we note that existing simplex frequencies are used extensively by the U.S. government and foreign vessels. Consequently, there exists a potential for substantial interference to these simplex frequencies because they are used for many purposes worldwide. Regardless, we expect that this proposal would provide flexibility to expand public correspondence where needed. We seek comments on using simplex frequencies for public correspondence that are shared extensively with the U.S. government and the international community. Comments also should address what types of public correspondence communications may warrant simplex rather than duplex frequency assignments with a power limit of 1 kW PEP.

14. The 1987 Mobile WARC also revised certain radiotelephony frequencies that are available for multiple purposes.[16] International provisions permit distress and safety frequencies 4125 kHz and 6215 kHz to be used on a simplex basis for initiating communications between ship and coast stations (call and reply). The frequency 4125 kHz is available also on a simplex basis for business and operational use. Additionally, two of the paired coast frequencies identified for call and reply, are available on a simplex basis for business and operational purposes (*i.e.*, 4417 kHz and 6516 kHz are paired with 4125 kHz and 6215 kHz, respectively). The following table summarizes permitted international use.

Old Frequencies	New Frequencies	distress safety	ship call/reply	coast call/reply	business operational
4125.0 kHz	4125 kHz	x	x	x	x
4419.4 kHz	4417 kHz	-	-	x	x
6215.5 kHz	6215 kHz	x	x	x	-
6521.9 kHz	6516 kHz	-	-	x	x

Currently, the Commission's Rules permit the frequencies 4125.0 kHz, 4419.4 kHz, and 6521.9 kHz to be used for business and operational purposes, but the Rules do not include any frequencies in the 4 MHz and 6 MHz bands for call and reply purposes. Therefore, as permitted by international provisions, we propose to add a frequency pair in the 4 MHz and 6 MHz bands to 47 C.F.R. § 80.369(d) for call and reply purposes. Additionally, we propose to continue to permit these frequencies to be used for business and operational purposes in 47 C.F.R. § 80.373(c). We request comments regarding the relative requirements for distress and safety, call and reply, and business and operational communications on these frequencies.

15. Our last issue regarding newly available frequencies concerns spectrum in the 4000-4063 kHz and 8100-8195 kHz bands allocated for radiotelephony in the maritime mobile service on a shared basis with the fixed service. In 1979, these frequency bands, previously allocated exclusively to the fixed service, were re-allocated internationally to the maritime mobile and fixed services on co-primary basis.[17] In 1983, these bands were channelized and the provisions for maritime mobile use were adopted internationally. We propose to incorporate a new section, 47 C.F.R. § 80.374, into the Commission's Rules to list 49 maritime mobile channels, which are shared with the fixed services, in accordance international provisions.[18] In addition to the ship-to-ship operations permitted internationally, the proposed changes would allow the 4 MHz frequencies to be used by coast stations.[19] All public coast station applications would be submitted to the Frequency Assignment Subcommittee (FAS) for coordination with existing government fixed users on a case-by-case basis for a particular coast station's characteristics. Because these bands are used extensively by the fixed services, maritime frequency assignments will be limited.[20] We believe, however, that these proposed changes to the Commission's Rules are important because they would permit, where possible, the maritime mobile service access to these shared bands. This would promote the use of these bands in which the maritime mobile service has a co-primary allocation and would provide the necessary data to make contributions to International Radio Consultative Committee (CCIR) sharing studies concerning the maritime mobile and fixed services.

16. *Implementation*. As indicated previously, under the international Radio Regulations at 0001 hours UTC on July 1, 1991, all coast and ship stations (worldwide) operating in the exclusive maritime mobile HF bands must cease transmitting on their old frequencies and start transmitting on their new frequencies. Virtually every maritime mobile licensee authorized an HF frequency will have to change frequency. In addition, numerous additional HF frequencies will become available for NBDP, DSC, and radiotelephony. Without careful preparation, there is a potential for extensive interference within the maritime mobile service. Therefore, we will outline our approach now and seek comments on how effectively to enact the revisions. Industry and user support and participation on all levels is essential for this effort to succeed.

17. The number of HF coast stations involved varies from approximately 34 public coast to 9000 private coast stations. Effective immediately, the Commission will start specifying both the "current" and the "transfer" frequencies on all coast station licenses generated.[21] We expect that approximately half the existing coast station licenses would be updated through the processing of renewals and modifications of licenses over the next 1 1/2 years. Each remaining coast station licensee will be notified of the frequency to which it must transfer its operation approximately 90 days prior to the effective date of July 1, 1991. We encourage licensees to renew prior to their expiration date to enable us to process the applications in a timely manner and minimize the number of 90 day notifications involved.

18. Frequency changes for authorized ship stations present a different set of problems. Ship station licenses simply indicate authorized bands and not individual frequencies. While the administrative impact of updating licenses is not at issue, the practical problem of informing the ship operators is of great concern.[22] We expect that it would be in the interest of public coast stations, which provide the services to commercial vessels, to assist in disseminating information to these ship operators. Consequently, we expect that most commercial ship operators will be advised of the frequency changes through Public Notices by the Commission or advisories directly from public coast stations. For the business and recreational users, however, we recognize the need for more direct avenues than publication in the Federal Register. Con-

sequently, we propose to send information denoting the transfer frequencies to any entity or organization that furnishes its mailing address.[23]

19. Effective July 1, 1991, additional HF frequencies also will become available. We propose that these frequencies be available after that date through the normal application process. We propose, however, to amend the rules to require applications for public coast stations to include a justification for additional channels based on the criteria recently proposed for NBDP (*i.e.*, 40 percent usage of existing frequencies at peak hours).[24] This justification would be required for public coast station applicants that request frequencies for manual Morse code telegraphy in 47 C.F.R. § 80.357(b), for radiotelephony in 47 C.F.R. § 80.371(b), and for the shared 4 MHz and 8 MHz frequencies in 47 C.F.R. § 80.374.[25] This requirement would foster the efficient use of the available frequencies. On the other hand, we propose to handle the new 26 MHz band frequencies for public coast stations working Morse code telegraphy, 47 C.F.R. § 80.357(b) and the new 4 MHz and 6 MHz band frequencies for radiotelephony call and reply, 47 C.F.R. § 80.369(d), differently. These additional frequencies represent a simple expansion to present assignments. Because there is no frequency pool available from which assignments could be distributed, these new frequencies could be added to frequency groups already assigned (*i.e.*, a 26 MHz frequency would be added to stations currently authorized frequencies in the 4, 6, 8, 12, 16, and 22 MHz bands). Thus, we propose to include these new frequencies automatically on public coast licenses renewed or modified after adoption of the Report and Order in this proceeding. We believe this procedure would be efficient and fair because all licensees would have equal access to these new frequencies without encountering the delays inherent in the application process.

IV. PAPERWORK REDUCTION ACT STATEMENT

20. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information requirement on the public if the proposed requirement to submit a justification for additional frequencies is adopted. This justification is proposed for public coast stations requesting additional Morse code telegraphy working frequencies, public correspondence frequencies, and the limited shared spectrum in the 4 MHz and 8 MHz bands. The proposal would require public coast station applicants to include a traffic showing based on records kept for other business purposes. Because public coast stations are common carriers, they already maintain records on traffic for billing purposes and must file tariffs with the Commission for the communication services provided. Additionally, there are currently only 34 licensed public coast stations operating in the HF bands. Stations operating on frequencies in the HF bands typically service the high seas, cover large service areas, and offer the potential for worldwide interference. With regard to the 4 MHz and 8 MHz shared spectrum, a statement of need and expected use would be extremely valuable for coordination with the fixed operations currently located in these bands. Further, this requirement would not be imposed on coast station applicants generally, but only on those parties that wish to pursue the newly available frequencies. Because public coast stations currently maintain these records for other purposes, the submission of a showing based on the schedule of service and the amount of traffic on existing frequencies for public coast stations should not be a significant burden. Nevertheless, implementation of any new or modified requirements, such as the justification showing, is subject to approval by the Office of Management and Budget as prescribed by the Paperwork Reduction Act.

V. PROCEDURAL MATTERS

21. In accordance with Section 605 (b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b), our initial analysis of the economic impact of these proposals to small entities is set forth in Appendix A.

22. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

23. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.1202(b). Any person who makes or submitts a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

24. Any person who is making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact than an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. *See* 47 C.F.R. § 1.1206.

25. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **June 8, 1990** and reply comments on or before **July 9, 1990.** All relevant and timely comments will be considered by the Commission before taking final action in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

26. IT IS ORDERED that a copy of this *Notice* shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

In accordance with Section 605 (b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605(b), our initial analysis of the economic impact of these proposals to small entities is as follows:

(a) *Reason for action.* This action is proposed to incorporate the international revisions to the HF bands (4000-27500 kHz) adopted by the 1987 Mobile WARC into the Commission's Rules.

(b) *Objectives.* The objective of this proposal is to bring the maritime mobile service within the United States into conformance with international requirements. The HF band revisions adopted by the 1987 Mobile WARC decrease frequencies allocated for Morse code and increase frequencies available for newer forms of maritime communications (*i.e.*, automated DSC and NBDP telegraphy, and radiotelephony). To provide for this shift in services, the existing frequencies in the maritime mobile HF bands were rearranged. These revisions provide for growth in the maritime mobile service by providing for a more effective use of the radio spectrum.

(c) *Legal Basis.* The proposed action is authorized under Section 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(c), 303(f), 303(g), and 303(r). These sections authorize the Commission to make such rules and regulations as may be necessary to encourage more effective use of the radio spectrum.

(d) *Reporting, recordkeeping, and other compliance requirements.* We propose that public coast station applicants that wish additional frequencies for coast Morse code telegraphy, public correspondence, or the new 4 MHz and 8 MHz shared spectrum submit a showing of need. Because public coast stations are common carriers, they already maintain records on traffic for billing purposes and must file tariffs with the Commission for the communication services provided. At present, there are 34 licensed public coast stations operating in the HF bands. Because public coast stations currently maintain these records for other purposes, the submission of a showing based on the schedule of service and the amount of traffic on existing frequencies for public coast stations should not be a significant burden.

(e) *Federal rules which overlap, duplicate, or conflict with this rule.* None.

(f) *Description, potential impact, and number of small entities involved.* The proposed revisions would change virtually every ship and coast station frequency in the HF bands. The proposed frequency changes would require all equipment that is crystal tuned to be re-fitted with new crystals. Consequently, all businesses using such equipment, including the fishing industry, would be affected. There are currently over 40,000 licensed ship and coast stations operating in the HF bands. We estimate that between five and ten percent of existing stations use equipment that is crystal tuned and the cost of re-fitting a radio with new crystals should not exceed $100. We request comments on the estimates presented here and the potential impact of the proposed rule changes to small entities generally.

(g) *Any significant alternatives minimizing the impact on small entities and existing licensees and consistent with the stated objectives.* None. These changes are necessary to comport with international treaty requirements.

FOOTNOTES

[1] *See* Public Notice, 3 FCC Rcd 6780 (1988).

[2] *Report and Order*, GEN Docket No. 89-103, adopted September 19, 1989, 4 FCC Rcd 7603 (1989).

[3] The GMDSS will replace the present maritime distress and safety system which relies on ship-to-ship distress alerting using manual Morse code. It will provide a new standard of safety for seafarers worldwide. The GMDSS will rely primarily on ship-to-shore distress alerting using satellites and improved HF terrestrial systems employing automated digital communications techniques. The revisions to the Radio Regulations become effective on July 1, 1991. The system will be phased in worldwide from 1992 to 1999.

[4] By formal agreement with the other government agencies, the 400 additional duplex frequencies were divided evenly between government and non-government. As is the current practice, the simplex frequencies will be shared between government and non-government ship station users. *See* Public Notice, 3 FCC Rcd 6782 (1988).

[5] Only 9 coast station working frequencies for Morse code telegraphy were affected by the international revisions. Additionally, we propose to delete two frequencies, 16847.3 kHz and 16018.8 kHz, from 47 C.F.R. § 80.357(b) that are not consistent with the revised bands. Our records do not indicate any licensed operations on these two frequencies.

[6] Considering that the authorized bandwidth specified in 47 C.F.R. § 80.205 for Morse code telegraphy (A1A) is 0.4 kHz, 4.4 kilohertz of spectrum would result in 11 available frequencies.

[7] *See* Nos. 4323BF and 4323BI of the Final Acts of the 1987 Mobile WARC.

[8] Although the Rules stipulate that only one Channel Series will be assigned per ship, ship stations are authorized by frequency band and individual frequencies are not listed on licenses. Consequently, we propose to revise the language in 47 C.F.R. § 80.363(a) to indicate that the frequencies are available to authorized ship stations. Further, we propose to correct the language for all proposed rule sections to denote whether the frequencies listed are "available for assignment to coast stations" or "available for use by authorized ship stations."

[9] The government agencies are in agreement with a 3 kHz channelling plan.

[10] At present, four frequencies have been coordinated under the current procedures for Station WLO, Mobile, Alabama.

[11] The 70 additional frequency pairs were divided evenly between government and non-government users. Consequently, 35 pairs would be available for non-government use. *See* Public Notice, *supra*.

[12] We requested all 35 channels at the 9 public coast station locations for a total of 315 allotments.

[13] Resolution 325 stipulates the priorities to be used in developing a worldwide HF plan as follows: (1) administrations having no allotments in Appendix 25; (2) administrations where an allotment was rejected as failing to meet the required protection criteria; and (3) administrations asking for additional allotments to satisfy an increase in radiotelephony traffic. Our submissions fall into category 3, the lowest priority.

[14] *See* Appendix 16B of the Final Acts of the 1987 Mobile WARC.

[15] These simplex radiotelephony frequencies are considered "common use" frequencies under the international Radio Regulations. As such, they cannot be notified for inclusion in the Master International Frequency Register which provides stations with interference protection. These frequencies can be listed in the international List of Coast Stations but this document offers no interference protection. *See* Radio Regulation No. 1220 and Recommendation 304.

[16] Where international provisions permit use of a frequency for general radiotelephony, we have denoted it as business and operational in accordance with our domestic terminology.

[17] The continued sharing of these frequency bands by the maritime mobile and fixed services is subject to additional studies by the International Radio Consultative Committee (CCIR) and decisions by future conferences of the International Telecommunications Union (ITU). *See* US236 and Resolution 319 of the Final Acts of the 1987 Mobile WARC.

[18] Although 52 frequencies (21 and 31 frequencies at 4 and 8 MHz, respectively) were designated internationally for the maritime mobile service, the new proposed section lists only 49 frequencies (20 and 29 frequencies at 4 and 8 MHz, respectively). Three frequencies were coordinated with the government fixed services and are proposed for use in duplex operations for public correspondence in 47 C.F.R. § 80.371. (Frequencies 4060, 8113, and 8128 kHz are proposed for paired use with duplex frequencies 4351, 8713, and 8716 kHz, or Channel Nos. 428, 836, and 837, respectively). This discussion and the proposed new section addresses the remaining 49 frequencies that continue to be shared with fixed operations. *See* Appendix 16C-1 and 16C-2 of the Final Acts of the 1987 Mobile WARC.

[19] Internationally, the 4 MHz frequencies are limited to ship stations (*see* Radio Regulation No. 517). Individual countries, however, may deviate from international provisions so long as harmful interference is not caused to services carried by other administrations in accordance with international regulations (*see* Radio Regulation No. 342). We believe that coast station operation is possible without interference to other administrations because of the limited range of frequencies in the 4 MHz and 8 MHz bands. We further note that the U.S. proposal to the 1987 Mobile WARC was to make these frequencies available to both ship and coast stations.

[20] The proposed frequencies or station characteristics may need to be changed to permit sharing between the maritime mobile and fixed services. In some instances, no shared frequency assignments may be found.

[21] Licenses for coast stations that have to change frequency will indicate the authorized frequencies for both before, and after, July 1, 1991.

[22] With regard to ship licenses for Morse code telegraphy working channels, two Channel Series are noted on the license. If the number of available Channel Series remains the same as proposed (*i.e.*, 62), ships can simply transfer to the new frequencies that corresponds to their existing authorized Channel Series.

[23] Requests should be mailed to the International Liaison Staff, Special Services Division, Private Radio Bureau, with attention to "Docket 90-133, Revision of HF Maritime Frequencies" and should indicate the type of operation and frequencies currently in use (for example, recreational use of 4125.0 kHz, 4143.6 kHz, and 4419.4 kHz by yacht club members). Publications of this information by magazines or news letters concerning the maritime service or manufacturers of HF maritime equipment would be especially helpful.

[24] The submission of a justification of need based on traffic for public coast stations is similiar to the requirement recently proposed for NBDP frequencies, 47 C.F.R. § 80.361(a). *See Notice of Proposed Rule Making*, PR Docket No. 89-524, adopted November 2, 1989, 4 FCC Rcd 8072 (1989).

[25] Revision of the application criteria for paired NBDP frequencies in 47 C.F.R. § 80.361(a) is proposed so that its language is uniform with the other proposed sections.

A P P E N D I X B

Parts 2 and 80 of Title 47 of the Code of Federal Regulations would be amended as follows:

1. The authority citation for Part 2 would continue to read as follows:

AUTHORITY: Secs. 4, 302, 303, 307, 48 stat. 1066, 1082, as amended; 47 U.S.C. 154, 302, 303, 307, unless otherwise noted.

2. Section 2.106 would be amended by revising the Table of Frequency Allocations and subsequent Footnotes in the appropriate positions to read as follows:

§2.106 Table of Frequency Allocatic

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
*	*	*	*	*		*
4 000 - 4 063 * * *			4 000 - 4 438 MARITIME MOBILE 500A 500B 520 520B	4 000 - 4 438 MARITIME MOBILE 500A 500B 520 520B	* * *	
4 063 - 4 438 MARITIME MOBILE 500A 500B 520 520A 520B 518 519			US82 ~~US242~~-US236 US296	US82 ~~US242~~-US236 US296		
*	*	*	*	*		*
6 200 - 6 525 MARITIME MOBILE ~~523~~- 500A 500B 520 520B 522			6 200 - 6525 MARITIME MOBILE ~~523~~-500A 500B 520 520B ~~522~~- US82 ~~US284~~-US296	6 200 - 6 525 MARITIME MOBILE ~~523~~-500A 500B 520 520B ~~522~~- US82 ~~US284~~-US296	* * *	
*	*	*	*	*		*

§2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
8 100 - 8 195			8 100 - 8 815	8 100 - 8 815		
* * *			MARITIME MOBILE 500A 500B 520B 529A	MARITIME MOBILE 500A 500B 520B 529A	* * *	
8 195 - 8 815						
MARITIME MOBILE 500A 500B 520B 529A						
501			501 US82 US236 ~~US241~~- US296	501 US82 US236 ~~US241~~- US296		
*	*		*	*		*
12 230 - 13 200			12 230 - 13 200	12 230 - 12 1300		
MARITIME MOBILE 500A 500B 520B 529A			MARITIME MOBILE 500A 500B 520B 529A	MARITIME MOBILE 500A 500B 520B 529A	* * *	
532			US82 ~~US235~~-US296	US82 ~~US235~~-US296		
*	*		*	*		*
16 360 - 17 410			16 360 - 17 410	16 360 - 17 410		
MARITIME MOBILE 500A 500B 520B 529A			MARITIME MOBILE 500A 500B 520B 529A	MARITIME MOBILE 500A 500B 520B 529A	MARITIME (80)	
532			US82 ~~US235~~-	US82 ~~US235~~-		
-	-		-	-		-

532		US82 ~~US235-~~	US82 ~~US235-~~			
*	*	*	*			

§2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
18 168 - 18 780	FIXED Mobile except aeronautical mobile		18 168 - 18 780 FIXED Mobile	18 168 - 18 780 FIXED Mobile	* * *	
18 780 - 18 900	MARITIME MOBILE 532		18 780 - 18 900 MARITIME MOBILE US82 ~~US235-~~US296	18 780 - 18 900 MARITIME MOBILE US82 ~~US235-~~US296	* * *	
*	*		*	*		*
19 680 - 19 800	MARITIME MOBILE 520B 532		19 680 - 19 800 MARITIME MOBILE 520B ~~US235-~~	19 680 - 19 800 MARITIME MOBILE 520B ~~US235-~~	* * *	
*	*		*	*		*
22 000 - 22 855	MARITIME MOBILE 520B 532 540		22 000 - 22 855 MARITIME MOBILE 520B ~~US235-~~ US82 US296	22 000 - 22 855 MARITIME MOBILE 520B ~~US235-~~ US82 US296	* * *	
*	*		*	*		*

§2.106 Table of Frequency Allocations

INTERNATIONAL TABLE			UNITED STATES TABLE		FCC USE DESIGNATORS	
Region 1 Allocation kHz	Region 2 Allocation kHz	Region 3 Allocation kHz	GOVERNMENT Allocation kHz	NON-GOVERNMENT Allocation kHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
25 070 - 25 210			25 070 - 25 210	25 070 - 25 210		
MARITIME MOBILE			MARITIME MOBILE	MARITIME MOBILE	* * *	
544			US82 ~~US235-~~ US281 US296	US82 ~~US235-~~ US281 US296 NG112		
*	*		*	*		*
26 100 - 26 175			26 100 - 26 175	26 100 - 26 175		
MARITIME MOBILE 520B			MARITIME MOBILE 520B	MARITIME MOBILE 520B	* * *	
544			~~US235-~~	~~US235-~~		
*	*		*	*		*

INTERNATIONAL FOOTNOTES

500 The carrier frequency 2182 kHz is an international distress and calling frequency for radiotelephony. The conditions for the use of the band 2173.5-2190.5 kHz are prescribed in Articles 37, 38, N 38, and 60.

500A The frequencies 2187.5 kHz, 4207.5 kHz, 6312 kHz, 8414.5 kHz, 12577 kHz, and 16804.5 kHz are international distress frequencies for digital selective calling. The conditions for the use of these frequencies are prescribed in Article N 38.

500B The frequencies 2174.5 kHz, 4177.5 kHz, 6268 kHz, 8376.5 kHz, 12520 kHz, and 16695 kHz are international distress frequencies for narrow-band direct-printing telegraphy. The conditions for the use of these frequencies are prescribed in Article N 38.

501 The carrier frequencies 2182 kHz, 3023 kHz, 5680 kHz, 8364 kHz and the frequencies 121.5 MHz, 156.8 MHz and 243 MHz may also be used, in accordance with the procedures in force for terrestrial radiocommunication services, for search and rescue operations concerning manned space vehicles. The conditions for the use of the frequencies are prescribed in Articles 38 and N 38. The same applies to the frequencies 10003 kHz, 14993 kHz and 19993 kHz, but in each of these cases emissions must be confined in a band of $\pm$ 3 kHz about the frequency.

505 The carrier (reference) frequencies 3023 kHz and 5680 kHz may also be used, in accordance with Articles 38 and N 38 by stations of the maritime mobile service engaged in coordinated search and rescue operations.

517 The use of the band 4000-4063 kHz by the maritime mobile service is limited to ship stations using radiotelephony (see No. 4374 and Appendix 16).

520 The conditions for the use of the carrier frequencies 4125 kHz and 6215 kHz are prescribed in Article 37, 38, N 38 and 60.

520A The frequency 4209.5 kHz is used exclusively for the transmission by coast stations of meteorological and navigational warnings and urgent information to ships by means of narrow-band direct-printing techniques (see Resolution 332 (Mob-87)).

520B The frequencies 4210 kHz, 6314 kHz, 8416.5 kHz, 12579 kHz, 16806.5 kHz, 19680.5 kHz, 22376 kHz, and 26100.5 kHz are the international frequencies for the transmissions of Maritime Safety Information (MSI) (see Resolution 333 (Mob-87) and Appendix 31).

523 delete... footnote.

529A The conditions for the use of the carrier frequency 8291 kHz, 12290 kHz, and 16420 kHz are prescribed in Articles 38, N 38 and 60.

UNITED STATES (US) FOOTNOTES

US296 Until July 1, 1991, in the bands designated for ship wide-band telegraphy, facsimile and special transmission systems, the following assignable frequencies are available to non-Government stations on a shared basis with Government stations: 2070.5, 2072.5, 2074.5, 2076.5, 4160.6, 4168, 6238.6, 6242.6, 8326, 8341.5, 12485, 12489, 16654, 16658, 22186 and 22190 kHz. Effective July 1, 1991, in the bands designated for ship wide-band telegraphy, facsimile and special transmission systems, the following assignable frequencies are available to non-Government stations on a shared basis with Government stations: 2070.5, 2072.5, 2074.5, 2076.5, 4154.5, 4169.5, 6235.5, 6259.5, 8302.5, 8338.5, 12370.5, 12418.5, 16551.5, 16614.5, 18847.5, 18868.5, 22181.5, 22238.5, 25123.5, and 25159.5 kHz.

3. The authority citation for Part 80 would continue to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

4. In Section 80.355, paragraph (c)(2) would be amended by revising it in its entirety to read as follows:

§ 80.355 Distress, urgency, safety, call and reply Morse code frequencies.

* * * * *

(c) * * *

(2) Ship station frequencies. The following table describes the calling frequencies in the 4000-27500 kHz band which are available for use by authorized ship stations equipped with crystal controlled oscillators for A1A or J2A radiotelegraphy. There are two series of frequencies for worldwide use and two series of frequencies for each geographic region. Ship stations with synthesized transmitters may operate on every full 100 Hz increment in the 0.5 kHz channel for the frequencies listed, except for 100 Hz above and below those designated for worldwide use. During normal business hours when not communicating on other frequencies, all U.S. coast radiotelegraph stations must guard the worldwide frequencies and the initial calling frequencies for the region in which it is located. The specific frequencies which must be guarded at a coast station will vary with propagation conditions. The calling frequencies which are routinely guarded by specific coast stations can be determined by reference to the ITU publication entitled "List of Coast Stations". Initial calls by ship stations must be made on the appropriate initial calling frequency first. Calls on the worldwide frequencies may be made only after calls on the appropriate initial calling frequency are unsuccessful.

Region	Ship Morse calling frequencies (kHz)						
Worldwide	4184 4184.5	6276 6276.5	8368 8369	12552 12553.5	16736 16738	22280.5 22281	25172 25172
Atlantic							
initial	4182	6277	8366	12550	16734	22279.5	25171.5
alternate	4182.5	6277.5	8366.5	12550.5	16734.5	22280	25171.5
Caribbean							
initial	4182	6277	8366	12550	16734	22279.5	25171.5
alternate	4182.5	6277.5	8366.5	12550.5	16734.5	22280	25171.5
Gulf-Mexico							
initial	4183	6278	8367	12551	16735	22281.5	25171.5
alternate	4183.5	6278.5	8367.5	12551.5	16735.5	22282	25171.5
N Pacific							
initial	4185	6279	8368.5	12552.5	16736.5	22282.5	25172.5
alternate	4185.5	6279.5	8369.5	12553	16737	22283	25172.5
S Pacific							
initial	4186	6280	8370	12554	16737.5	22283.5	25172.5
alternate	4186.5	6280.5	8370.5	12554.5	16738.5	22284	25172.5

* * * * *

5. In Section 80.357, paragraph (a)(3) would be amended by revising it in its entirety, the table following paragraph (b)(1) would be amended by revising columns entitled 16 MHz and 22 MHz and by adding column 26 MHz, and paragraph (b)(2)(ii) would be amended in its entirety to read as follows:

§ 80.357 Morse code working frequencies.

* * * * *

(a) * * *

(3) Frequencies in the 2000-27500 kHz band. This paragraph describes the working frequencies and Channel Series in the 2000-27500 kHz band which are assignable to ship stations.

(i) Two Channel Series will be assigned for routine use to each ship station. Frequencies from any other Channel Series may be used if the frequencies in the assigned Channel Series are not adequate for communications.

Channel Series	Ship Morse working frequencies (kHz)						
W1	4187.0	6285.0	8342.0 8343.5	12422.0 12453.0	16619.0 16650.0 16681.0	22242.0 22273.0	25161.5
W2	4187.5	6285.5	8342.5 8344.0	12422.5 12453.5	16619.5 16650.5 16681.5	22242.5 22273.5	25162.0
W3	4188.0	6286.0	8343.0 8344.5	12423.0 12454.0	16620.0 16651.0 16682.0	22243.0 22274.0	25162.5
W4	4188.5	6286.5	8343.5 8345.0	12423.5 12454.5	16620.5 16651.5 16682.5	22243.5 22274.5	25163.0
W5	4189.0	6287.0	8344.0 8345.5	12424.0 12455.0	16621.0 16652.0 16683.0	22244.0 22275.0	25163.5
W6	4189.5	6287.5	8344.5 8346.0	12424.5 12455.5	16621.5 16652.5 16619.0	22244.5 22275.5	25164.0
W7	4190.0	6288.0	8345.0 8346.5	12425.0 12456.0	16622.0 16653.0 16619.5	22245.0 22276.0	25164.5
W8	4190.5	6288.5	8345.5 8347.0	12425.5 12456.5	16622.5 16653.5 16620.0	22245.5 22276.5	25165.0
W9	4191.0	6289.0	8346.0 8347.5	12426.0 12457.0	16623.0 16654.0 16620.5	22246.0 22277.0	25165.5

W10	4191.5	6289.5	8346.5	12426.5	16623.5	22246.5	25166.0
			8348.0	12457.5	16654.5	22270.5	
					16621.0		
W11	4192.0	6290.0	8347.0	12427.0	16624.0	22247.0	25166.5
			8348.5	12458.0	16655.0	22278.0	
					16621.5		
W12	4192.5	6290.5	8347.5	12427.5	16624.5	22247.5	25167.0
			8349.0	12458.5	16655.5	22278.5	
					16622.0		
W13	4193.0	6291.0	8348.0	12428.0	16625.0	22248.0	25167.5
			8349.5	12459.0	16656.0	22279.0	
					16622.5		
W14	4193.5	6291.5	8348.5	12428.5	16625.5	22248.5	25168.0
			8350.0	12459.5	16656.5	22242.0	
					16623.0		
W15	4194.0	6292.0	8349.0	12429.0	16626.0	22249.0	25168.5
			8350.5	12460.0	16657.0	22242.5	
					16623.5		
W16	4194.5	6292.5	8349.5	12429.5	16626.5	22249.5	25169.0
			8351.0	12460.5	16657.5	22243.0	
					16624.0		
W17	4195.0	6293.0	8350.0	12430.0	16627.0	22250.0	25169.5
			8351.5	12461.0	16658.0	22243.5	
					16624.5		
W18	4195.5	6293.5	8350.5	12430.5	16627.5	22250.5	25170.0
			8352.0	12461.5	16658.5	22244.0	
					16625.0		
W19	4196.0	6294.0	8351.0	12431.0	16628.0	22251.0	25170.5
			8352.5	12462.0	16659.0	22244.5	
					16625.5		
W20	4196.5	6294.5	8351.5	12431.5	16628.5	22251.5	25171.0
			8353.0	12462.5	16659.5	22245.0	
					16626.0		
W21	4197.0	6295.0	8352.0	12432.0	16629.0	22252.0	25161.5
			8353.5	12463.0	16660.0	22245.5	
					16626.5		
W22	4197.5	6295.5	8352.5	12432.5	16629.5	22252.5	25162.0
			8354.0	12463.5	16660.5	22246.0	
					16627.0		
W23	4198.0	6296.0	8353.0	12433.0	16630.0	22253.0	25162.5
			8354.5	12464.0	16661.0	22246.5	
					16627.5		
W24	4198.5	6296.5	8353.5	12433.5	16630.5	22253.5	25163.0
			8355.0	12464.5	16661.5	22247.0	
					16628.0		
W25	4199.0	6297.0	8354.0	12434.0	16631.0	22254.0	25163.5
			8355.5	12465.0	16662.0	22247.5	
					16628.5		

W26	4199.5	6297.5	8354.5	12434.5	16631.5	22254.5	25164.0
			8356.0	12465.5	16662.5	22248.0	
					16629.0		
W27	4200.0	6298.0	8355.0	12435.0	16632.0	22255.0	25164.5
			8356.5	12466.0	16663.0	22248.5	
					16629.5		
W28	4200.5	6298.5	8355.5	12435.5	16632.5	22255.5	25165.0
			8357.0	12466.5	16663.5	22249.0	
					16630.0		
W29	4201.0	6299.0	8356.0	12436.0	16633.0	22256.0	25165.5
			8357.5	12467.0	16664.0	22249.5	
					16630.5		
W30	4201.5	6299.5	8356.5	12436.5	16633.5	22256.5	25166.0
			8358.0	12467.5	16664.5	22250.0	
					16631.0		
W31	4202.0	6300.0	8357.0	12437.0	16634.0	22257.0	25166.5
			8358.5	12468.0	16665.0	22250.5	
					16631.5		
W32	4202.0	6300.0	8357.5	12437.5	16634.5	22257.5	25167.0
			8359.0	12468.5	16665.5	22251.0	
					16632.0		
W33	4201.5	6299.5	8358.0	12438.0	16635.0	22258.0	25167.5
			8359.5	12469.0	16666.0	22251.5	
					16632.5		
W34	4201.0	6299.0	8358.5	12438.5	16635.5	22258.5	25168.0
			8360.0	12469.5	16666.5	22252.0	
					16633.0		
W35	4200.5	6298.5	8359.0	12439.0	16636.0	22259.0	25168.5
			8360.5	12470.0	16667.0	22252.5	
					16633.5		
W36	4200.0	6298.0	8359.5	12439.5	16636.5	22259.5	25169.0
			8361.0	12470.5	16667.5	22253.0	
					16634.0		
W37	4199.5	6297.5	8360.0	12440.0	16637.0	22260.0	25169.5
			8361.5	12471.0	16668.0	22253.5	
					16634.5		
W38	4199.0	6297.0	8360.5	12440.5	16637.5	22260.5	25170.0
			8362.0	12471.5	16668.5	22254.0	
					16635.0		
W39	4198.5	6296.5	8361.0	12441.0	16638.0	22261.0	25170.5
			8362.5	12472.0	16669.0	22254.5	
					16635.5		
W40	4198.0	6296.0	8361.5	12441.5	16638.5	22261.5	25171.0
			8363.0	12472.5	16669.5	22255.0	
					16636.0		
W41	4197.5	6295.5	8362.0	12442.0	16639.0	22262.0	25161.5
			8363.5	12473.0	16670.0	22255.5	
					16636.5		

W42	4197.0	6295.0	8362.5	12442.5	16639.5	22262.5	25162.0
			8364.0	12473.5	16670.5	22256.0	
					16637.0		
W43	4196.5	6294.5	8363.0	12443.0	16640.0	22263.0	25162.5
			8364.5	12474.0	16671.0	22256.5	
					16637.5		
W44	4196.0	6294.0	8363.5	12443.5	16640.5	22263.5	25163.0
			8365.0	12474.5	16671.5	22257.0	
					16638.0		
W45	4195.5	6293.5	8364.0	12444.0	16641.0	22264.0	25163.5
			8365.5	12475.0	16672.0	22257.5	
					16638.5		
W46	4195.0	6293.0	8364.5	12444.5	16641.5	22264.5	25164.0
			8371.0	12475.5	16672.5	22258.0	
					16639.0		
W47	4194.5	6292.5	8365.0	12445.0	16642.0	22265.0	25164.5
			8371.5	12476.0	16673.0	22258.5	
					16639.5		
W48	4194.0	6292.0	8365.5	12445.5	16642.5	22265.5	25165.0
			8372.0	12476.5	16673.5	22259.0	
					16640.0		
W49	4193.5	6291.5	8371.0	12446.0	16643.0	22266.0	25165.5
			8372.5	12422.0	16674.0	22259.5	
					16640.5		
W50	4193.0	6291.0	8371.5	12446.5	16643.5	22266.5	25166.0
			8373.0	12422.5	16674.5	22260.0	
					16641.0		
W51	4192.5	6290.5	8372.0	12447.0	16644.0	22267.0	25166.5
			8373.5	12423.0	16675.0	22260.5	
					16641.5		
W52	4192.0	6290.0	8372.5	12447.5	16644.5	22267.5	25167.0
			8374.0	12423.5	16675.5	22261.0	
					16642.0		
W53	4191.5	6289.5	8373.0	12448.0	16645.0	22268.0	25167.5
			8374.5	12424.0	16676.0	22261.5	
					16642.5		
W54	4191.0	6289.0	8373.5	12448.5	16645.5	22268.5	25168.0
			8375.0	12424.5	16676.5	22262.0	
					16643.0		
W55	4190.5	6288.5	8374.0	12449.0	16646.0	22269.0	25168.5
			8375.5	12425.0	16677.0	22262.5	
					16643.5		
W56	4190.0	6288.0	8374.5	12449.5	16646.5	22269.5	25169.0
			8376.0	12425.5	16677.5	22263.0	
					16644.0		
W57	4189.5	6287.5	8375.0	12450.0	16647.0	22270.0	25169.5
			8342.0	12426.0	16678.0	22263.5	
					16644.5		

W58	4189.0	6287.0	8375.5 8342.5	12450.5 12426.5	16647.5 16678.5 16645.0	22270.5 22264.0	25170.0
W59	4188.5	6286.5	8376.0 8343.0	12451.0 12427.0	16648.0 16679.0 16645.5	22271.0 22264.5	25170.5
W60	4188.0	6286.0	8342.0 8343.5	12451.5 12427.5	16648.5 16679.5 16646.0	22271.5 22265.0	25171.0
W61	4187.5	6285.5	8342.5 8344.0	12452.0 12428.0	16649.0 16680.0 16646.5	22272.0 22265.5	25161.5
W62	4187.0	6285.0	8343.0 8344.5	12452.5 12428.5	16649.5 16680.5 16678.0	22272.5 22266.0	25162.0

(ii) If the frequencies listed in paragraph (3)(i) of this section are not adequate for communications, ship stations may use any of the non-paired narrow-band direct-printing frequencies listed in § 80.361(b) of this part for A1A or J2A radiotelegraphy.

(b) Coast station frequencies.

(1) Frequencies in the 100-27500 kHz band. The following table describes the working carrier frequencies in the 100-27500 kHz band which are assignable to coast stations located in the designated geographical areas.

Area	Coast Morse working frequencies (kHz)									
	100-160 kHz	405-525 kHz	2 MHz	4 MHz	6 MHz	8 MHz	12 MHz	16 MHz	22 MHz	26 MHz
Central Pacific..								17016.8	~~22425.0~~	26122.7
								17026.0	22479.0	26125.5
								17088.8	22515.0	.....
			*	*	*			~~16847.3~~	22557.0	.....
								.....	22675.5	.....
								.....	.....	.....
South Pacific....								17064.8	~~22413.0~~	26123.1
								17088.8	22467.0	.....
								~~16880.9~~	22663.5	.....
								17218.4	.....	.....
								.....	.....	.....
Gulf of Mexico...								~~16048.8~~	~~22431.0~~	26123.5
								17117.6	22467.0	26125.9
								17170.4	~~22318.5~~	.....
								17172.4	22569.0	.....
								~~16871.3~~	22681.0	.....
								17208.8	.....	.....
								.....	.....	.....
Great Lakes.....								.....	.....	.....
Hawaii.....								16978.4	22509.0	26123.9
Puerto Rico.....								.....	.....	.....
North Atlantic...								16933.2	~~22407.0~~	26124.3
								16968.8	22485.0	26126.3
								16973.6	22503.0	.....
								16997.6	22521.0	.....
								17021.6	~~22348.5~~	.....
								17093.6	22366.5	.....
								16904.9	22599.0	.....
								.....	22657.0	.....
								.....	.....	.....
Central Atlantic.								.....	.....	.....
South Atlantic...								16918.8	~~22431.0~~	26124.7
								17093.6	22503.0	26126.7
								17160.8	~~22318.5~~	.....
								17170.4	22569.0	.....
								~~16861.7~~	22681.0	.....
								17199.2	.....	.....
								.....	.....	.....
North Pacific....								17007.2	22539.0	26125.1
Alaska.....								.....	.....	.....

(2) * * *

(i) * * *

(ii) Frequencies above 5 MHz may be assigned primarily to stations serving the high seas and secondarily to stations serving inland waters of the United States, including the Great Lakes, under the condition that interference will not be caused to any coast station serving the high seas. Applicants for these frequencies must submit a substantial showing of need based on the following factors:

(A) a schedule of each currently licensed Morse working frequency and the expected use of the proposed frequencies;

(B) for additional frequencies within the same MHz band, a factual showing of the 3 busiest hours of any 4 days within a consecutive 10 day period for each of the 2 months immediately preceding the filing of the application indicating that the applicant has used its currently assigned frequencies within the same MHz band an aggregate average of at least 40% of the 3 busiest hours of each day for exchanging communications; and

(C) any other facts that support the need for the proposed assignment, e.g., evidence of radio interference by another station located near enough to render a currently licensed frequency substantially unusable.

* * * * *

6. Section 80.359 would be amended by revising paragraphs (a) and (b) in their entirety to read as follows:

§ 80.359 Frequencies for digital selective calling (DSC).

(a) General purpose calling.

(1) The following calling frequencies are available for assignment to public coast stations worldwide for general purpose DSC. The paired ship frequencies are available for use by authorized ship stations for general purpose DSC. These paired frequencies are the first choice for international use.

General purpose DSC	
Ship transmit[1] (in kHz unless otherwise noted)	Coast transmit
458.5	455.5
2189.5	2177.0
4208.0	4219.5
6312.5	6331.0
8415.0	8436.5
12577.5	12657.0
16805.0	16903.0
18898.5	19703.5
22374.5	22444.0
25208.5	26121.0
156.525 MHz	156.525 MHz

1 The frequency 2177.0 kHz is also available to ship stations for intership calling and acknowledgement of such calls only.

(2) The following calling frequencies are available for assignment to public coast stations in the East Coast, Gulf Coast, and Caribbean for general purpose DSC. The ship frequencies are available for use by authorized ship stations for general purpose DSC.

General purpose DSC	
Ship transmit (kHz)	Coast transmit (kHz)
4208.5	4220.0
6313.0	6331.5
8415.5	8437.0
12578.0	12657.5
16805.5	16903.5
18899.0	19704.0
22375.0	22444.5
25209.0	26121.5

(3) The following calling frequencies are available for assignment to public coast stations to any area not listed in paragraph (a)(2) of this section, for general purpose DSC. The ship frequencies are available for use by authorized ship stations for general purpose DSC.

General purpose DSC	
Ship transmit (kHz)	Coast transmit (kHz)
4209.0	4220.5
6313.5	6332.0
8416.0	8437.5
12578.5	12658.0
16806.0	16904.0
18899.5	19704.5
22375.5	22445.0
25209.5	26122.0

(b) Distress and safety calling. The frequencies 2187.5 kHz, 4207.5 kHz, 6312.0 kHz, 8414.5 kHz. 12577.0 kHz, 16804.5 kHz, and 156.525 MHz may be used for DSC by coast and ship stations on a simplex basis for distress and safety purposes. The provisions and procedures for distress and safety calling are contained in CCIR Recommendation 541 as modified by § 80.103(c) of this part.

* * * * *

7. In Section 80.361, paragraphs (a) and (b) would be revised in their entirety and a new paragraph (c) would be added to read as follows:

§ 80.361 Frequencies for narrow-band direct-printing (NBDP) and data transmissions.

(a) The following frequencies are available for assignment to public coast stations for narrow-band direct-printing (NBDP) and data transmissions. The paired ship frequencies are available for use by authorized ship stations for NBDP and data transmissions.

Ch. No.	Paired frequencies for NBDP and data transmissions (kHz)															
	4 MHz		6 MHz		8 MHz		12 MHz		16 MHz		18/19 MHz		22 MHz		25/26 MHz	
	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship
1	4210.5	4172.5	6314.5	6263.0	----	----	12579.5	12477.0	16807.0	16683.5	19681.0	18870.5	22376.5	22284.5	26101.0	25173.0
2	4211.0	4173.0	6315.0	6263.5	8417.0	8377.0	12580.0	12477.5	16807.5	16684.0	19681.5	18871.0	22377.0	22285.0	26101.5	25173.5
3	4211.5	4173.5	6315.5	6264.0	8417.5	8377.5	12580.5	12478.0	16808.0	16684.5	19682.0	18871.5	22377.5	22285.5	26102.0	25174.0
4	4212.0	4174.0	6316.0	6264.5	8418.0	8378.0	12581.0	12478.5	16808.5	16685.0	19682.5	18872.0	22378.0	22286.0	26102.5	25174.5
5	4212.5	4174.5	6316.5	6265.0	8418.5	8378.5	12581.5	12479.0	16809.0	16685.5	19683.0	18872.5	22378.5	22286.5	26103.0	25175.0
6	4213.0	4175.0	6317.0	6265.5	8419.0	8379.0	12582.0	12479.5	16809.5	16686.0	19683.5	18873.0	22379.0	22287.0	26103.5	25175.5
7	4213.5	4175.5	6317.5	6266.0	8419.5	8379.5	12582.5	12480.0	16810.0	16686.5	19684.0	18873.5	22379.5	22287.5	26104.0	25176.0
8	4214.0	4176.0	6318.0	6266.5	8420.0	8380.0	12583.0	12480.5	16810.5	16687.0	19684.5	18874.0	22380.0	22288.0	26104.5	25176.5
9	4214.5	4176.5	6318.5	6267.0	8420.5	8380.5	12583.5	12481.0	16811.0	16687.5	19685.0	18874.5	22380.5	22288.5	26105.0	25177.0
10	4215.0	4177.0	6319.0	6267.5	8421.0	8381.0	12584.0	12481.5	16811.5	16688.0	19685.5	18875.0	22381.0	22289.0	26105.5	25177.5
11	----	----	----	----	8421.5	8381.5	12584.5	12482.0	16812.0	16688.5	19686.0	18875.5	22381.5	22289.5	26106.0	25178.0
12	4215.5	4178.0	6319.5	6268.5	8422.0	8382.0	12585.0	12482.5	16812.5	16689.0	19686.5	18876.0	22382.0	22290.0	26106.5	25178.5
13	4216.0	4178.5	6320.0	6269.0	8422.5	8382.5	12585.5	12483.0	16813.0	16689.5	19687.0	18876.5	22382.5	22290.5	26107.0	25179.0
14	4216.5	4179.0	6320.5	6269.5	8423.0	8383.0	12586.0	12483.5	16813.5	16690.0	19687.5	18877.0	22383.0	22291.0	26107.5	25179.5
15	4217.0	4179.5	6321.0	6270.0	8423.5	8383.5	12586.5	12484.0	16814.0	16690.5	19688.0	18877.5	22383.5	22291.5	26108.0	25180.0
16	4217.5	4180.0	6321.5	6270.5	8424.0	8384.0	12587.0	12484.5	16814.5	16691.0	19688.5	18878.0	22384.0	22292.0	26108.5	25180.5
17	4218.0	4180.5	6322.0	6271.0	8424.5	8384.5	12587.5	12485.0	16815.0	16691.5	19689.0	18878.5	22384.5	22292.5	26109.0	25181.0
18			6322.5	6271.5	8425.0	8385.0	12588.0	12485.5	16815.5	16692.0	19689.5	18879.0	22385.0	22293.0	26109.5	25181.5
19			6323.0	6272.0	8425.5	8385.5	12588.5	12486.0	16816.0	16692.5	19690.0	18879.5	22385.5	22293.5	26110.0	25182.0
20			6323.5	6272.5	8426.0	8386.0	12589.0	12486.5	16816.5	16693.0	19690.5	18880.0	22386.0	22294.0	26110.5	25182.5
21			6324.0	6273.0	8426.5	8386.5	12589.5	12487.0	16817.0	16693.5	19691.0	18880.5	22386.5	22294.5		
22			6324.5	6273.5	8427.0	8387.0	12590.0	12487.5	16817.5	16694.0	19691.5	18881.0	22387.0	22295.0		
23			6325.0	6274.0	8427.5	8387.5	12590.5	12488.0	16818.0	16694.5			22387.5	22295.5		
24			6325.5	6274.5	8428.0	8388.0	12591.0	12488.5	----	----			22388.0	22296.0		
25			6326.0	6275.0	8428.5	8388.5	12591.5	12489.0	16818.5	16695.5			22388.5	22296.5		
26			6326.5	6275.5	8429.0	8389.0	12592.0	12489.5	16819.0	16696.0			22389.0	22297.0		
27			6327.0	6281.0	8429.5	8389.5	12592.5	12490.0	16819.5	16696.5			22389.5	22297.5		
28			6327.5	6281.5	8430.0	8390.0	12593.0	12490.5	16820.0	16697.0			22390.0	22298.0		
29			6328.0	6282.0	8430.5	8390.5	12593.5	12491.0	16820.5	16697.5			22390.5	22298.5		
30					8431.0	8391.0	12594.0	12491.5	16821.0	16698.0			22391.0	22299.0		
31					8431.5	8391.5	12594.5	12492.0	16821.5	16698.5			22391.5	22299.5		
32					8432.0	8392.0	12595.0	12492.5	16822.0	16699.0			22392.0	22300.0		
33					8432.5	8392.5	12595.5	12493.0	16822.5	16699.5			22392.5	22300.5		
34					8433.0	8393.0	12596.0	12493.5	16823.0	16700.0			22393.0	22301.0		

Ch. No.	Paired frequencies for NBDP and data transmissions (kHz)													
	4 MHz		6 MHz		8 MHz		12 MHz		16 MHz		18/19 MHz		22 MHz		25/26 MHz	
	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship
35							12596.5	12494.0	16823.5	16700.5			22393.5	22301.5		
36							12597.0	12494.5	16824.0	16701.0			22394.0	22302.0		
37							12597.5	12495.0	16824.5	16701.5			22394.5	22302.5		
38							12598.0	12495.5	16825.0	16702.0			22395.0	22303.0		
39							12598.5	12496.0	16825.5	16702.5			22395.5	22303.5		
40							12599.0	12496.5	16826.0	16703.0			22396.0	22304.0		
41							12599.5	12497.0	16826.5	16703.5			22396.5	22304.5		
42							12600.0	12497.5	16827.0	16704.0			22397.0	22305.0		
43							12600.5	12498.0	16827.5	16704.5			22397.5	22305.5		
44							12601.0	12498.5	16828.0	16705.0			22398.0	22306.0		
45							12601.5	12499.0	16828.5	16705.5			22398.5	22306.5		
46							12602.0	12499.5	16829.0	16706.0			22399.0	22307.0		
47							12602.5	12500.0	16829.5	16706.5			22399.5	22307.5		
48							12603.0	12500.5	16830.0	16707.0			22400.0	22308.0		
49							12603.5	12501.0	16830.5	16707.5			22400.5	22308.5		
50							12604.0	12501.5	16831.0	16708.0			22401.0	22309.0		
51							12604.5	12502.0	16831.5	16708.5			22401.5	22309.5		
52							12605.0	12502.5	16832.0	16709.0			22402.0	22310.0		
53							12605.5	12503.0	16832.5	16709.5			22402.5	22310.5		
54							12606.0	12503.5	16833.0	16710.0			22403.0	22311.0		
55							12606.5	12504.0	16833.5	16710.5			22403.5	22311.5		
56							12607.0	12504.5	16834.0	16711.0			22404.0	22312.0		
57							12607.5	12505.0	16834.5	16711.5			22404.5	22312.5		
58							12608.0	12505.5	16835.0	16712.0			22405.0	22313.0		
59							12608.5	12506.0	16835.5	16712.5			22405.5	22313.5		
60							12609.0	12506.5	16836.0	16713.0			22406.0	22314.0		
61							12609.5	12507.0	16836.5	16713.5			22406.5	22314.5		
62							12610.0	12507.5	16837.0	16714.0			22407.0	22315.0		
63							12610.5	12508.0	16837.5	16714.5			22407.5	22315.5		
64							12611.0	12508.5	16838.0	16715.0			22408.0	22316.0		
65							12611.5	12509.0	16838.5	16715.5			22408.5	22316.5		
66							12612.0	12509.5	16839.0	16716.0			22409.0	22317.0		
67							12612.5	12510.0	16839.5	16716.5			22409.5	22317.5		
68							12613.0	12510.5	16840.0	16717.0			22410.0	22318.0		
69							12613.5	12511.0	16840.5	16717.5			22410.5	22318.5		
70							12614.0	12511.5	16841.0	16718.0			22411.0	22319.0		

Ch. No.	Paired frequencies for NBDP and data transmissions (kHz)															
	4 MHz		6 MHz		8 MHz		12 MHz		16 MHz		18/19 MHz		22 MHz		25/26 MHz	
	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship
71							12614.5	12512.0	16841.5	16718.5			22411.5	22319.5		
72							12615.0	12512.5	16842.0	16719.0			22412.0	22320.0		
73							12615.5	12513.0	16842.5	16719.5			22412.5	22320.5		
74							12616.0	12513.5	16843.0	16720.0			22413.0	22321.0		
75							12616.5	12514.0	16843.5	16720.5			22413.5	22321.5		
76							12617.0	12514.5	16844.0	16721.0			22414.0	22322.0		
77							12617.5	12515.0	16844.5	16721.5			22414.5	22322.5		
78							12618.0	12515.5	16845.0	16722.0			22415.0	22323.0		
79							12618.5	12516.0	16845.5	16722.5			22415.5	22323.5		
80							12619.0	12516.5	16846.0	16723.0			22416.0	22324.0		
81							12619.5	12517.0	16846.5	16723.5			22416.5	22324.5		
82							12620.0	12517.5	16847.0	16724.0			22417.0	22325.0		
83							12620.5	12518.0	16847.5	16724.5			22417.5	22325.5		
84							12621.0	12518.5	16848.0	16725.0			22418.0	22326.0		
85							12621.5	12519.0	16848.5	16725.5			22418.5	22326.5		
86							12622.0	12519.5	16849.0	16726.0			22419.0	22327.0		
87							----	----	16849.5	16726.5			22419.5	22327.5		
88							12622.5	12520.5	16850.0	16727.0			22420.0	22328.0		
89							12623.0	12521.0	16850.5	16727.5			22420.5	22328.5		
90							12623.5	12521.5	16851.0	16728.0			22421.0	22329.0		
91							12624.0	12522.0	16851.5	16728.5			22421.5	22329.5		
92							12624.5	12522.5	16852.0	16729.0			22422.0	22330.0		
93							12625.0	12523.0	16852.5	16729.5			22422.5	22330.5		
94							12625.5	12523.5	16853.0	16730.0			22423.0	22331.0		
95							12626.0	12524.0	16853.5	16730.5			22423.5	22331.5		
96							12626.5	12524.5	16854.0	16731.0			22424.0	22332.0		
97							12627.0	12525.0	16854.5	16731.5			22424.5	22332.5		
98							12627.5	12525.5	16855.0	16732.0			22425.0	22333.0		
99							12628.0	12526.0	16855.5	16732.5			22425.5	22333.5		
100							12628.5	12526.5	16856.0	16733.0			22426.0	22334.0		
101							12629.0	12527.0	16856.5	16733.5			22426.5	22334.5		
102							12629.5	12527.5	16857.0	16739.0						
103							12630.0	12528.0	16857.5	16739.5						
104							12630.5	12528.5	16858.0	16740.0						
105							12631.0	12529.0	16858.5	16740.5						
106							12631.5	12529.5	16859.0	16741.0						
107							12632.0	12530.0	16859.5	16741.5						

Ch. No.	Paired frequencies for NBDP and data transmissions (kHz)															
	4 MHz		6 MHz		8 MHz		12 MHz		16 MHz		18/19 MHz		22 MHz		25/26 MHz	
	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship
108									16860.0	16742.0						
109									16860.5	16742.5						
110									16861.0	16743.0						
111									16861.5	16743.5						
112									16862.0	16744.0						
113									16862.5	16744.5						
114									16863.0	16745.0						
115									16863.5	16745.5						
116									16864.0	16746.0						
117									16864.5	16746.5						
118									16865.0	16747.0						
119									16865.5	16747.5						
120									16866.0	16748.0						
121									16866.5	16748.5						
122									16867.0	16749.0						
123									16867.5	16749.5						
124									16868.0	16750.0						
125									16868.5	16750.5						
126									16869.0	16751.0						
127									16869.5	16751.5						
128									16870.0	16752.0						
129									16870.5	16752.5						
130									16871.0	16753.0						
131									16871.5	16753.5						
132									16872.0	16754.0						

Ch. No.	Paired frequencies for NBDP and data transmissions (kHz)															
	4 MHz		6 MHz		8 MHz		12 MHz		16 MHz		18/19 MHz		22 MHz		25/26 MHz	
	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship	Coast	Ship

(1) Applicants for these frequencies must submit a substantial showing of need based on the following factors:

(i) a schedule of each currently licensed NBDP frequency and the expected use of the proposed frequencies;

(ii) for additional frequencies within the same MHz band, a factual showing of the 3 busiest hours of any 4 days within a consecutive 10 day period for each of the 2 months immediately preceding the filing of the application indicating that the applicant has used its currently assigned frequencies within the same MHz band an aggregate average of at least 40% of the 3 busiest hours of each day for exchanging communications; and

(iii) any other facts that support the need for the proposed assignment, e.g., evidence of radio interference by another station located near enough to render a currently licensed frequency substantially unusable.

(b) The following frequencies are available for use by authorized ship stations for NBDP and data transmissions with public coast stations. Public coast stations may receive only on these frequencies.

Ch. Ser.	Non-Paired NBDP Channels (kHz)							
1	4202.5	6300.5	8396.5	12560.0	16785.0	18893.0	22352.0	25193.0
2	4203.0	6301.0	8397.0	12560.5	16785.5	18893.5	22352.5	25193.5
3	4203.5	6301.5	8397.5	12561.0	16786.0	18894.0	22353.0	25194.0
4	4204.0	6302.0	8398.0	12561.5	16786.5	18894.5	22353.5	25194.5
5	4204.5	6302.5	8398.5	12562.0	16787.0	18895.0	22354.0	25195.0
6	4205.0	6303.0	8399.0	12562.5	16787.5	18895.5	22354.5	25195.5
7	4205.5	6303.5	8399.5	12563.0	16788.0	18896.0	22355.0	25196.0
8	4206.0	6304.0	8400.0	12563.5	16788.5	18896.5	22355.5	25196.5
9	4206.5	6304.5	8400.5	12564.0	16789.0	18897.0	22356.0	25197.0
10	4207.0	6305.0	8401.0	12564.5	16789.5	18897.5	22356.5	25197.5
11		6305.5	8401.5	12565.0	16790.0	18898.0	22357.0	25198.0
12		6306.0	8402.0	12565.5	16790.5		22357.5	25198.5
13		6306.5	8402.5	12566.0	16791.0		22358.0	25199.0
14		6307.0	8403.0	12566.5	16791.5		22358.5	25199.5
15		6307.5	8403.5	12567.0	16792.0		22359.0	25200.0
16		6308.0	8404.0	12567.5	16792.5		22359.5	25200.5
17		6308.5	8404.5	12568.0	16793.0		22360.0	25201.0
18		6309.0	8405.0	12568.5	16793.5		22360.5	25201.5
19		6309.5	8405.5	12569.0	16794.0		22361.0	25202.0
20		6310.0	8406.0	12569.5	16794.5		22361.5	25202.5
21		6310.5	8406.5	12570.0	16795.0		22362.0	25203.0
22		6311.0	8407.0	12570.5	16795.5		22362.5	25203.5
23		6311.5	8407.5	12571.0	16796.0		22363.0	25204.0
24			8408.0	12571.5	16796.5		22363.5	25204.5

25			8408.5	12572.0	16797.0		22364.0	25205.0
26			8409.0	12572.5	16797.5		22364.5	25205.5
27			8409.5	12573.0	16798.0		22365.0	25206.0
28			8410.0	12573.5	16798.5		22365.5	25206.5
29			8410.5	12574.0	16799.0		22366.0	25207.0
30			8411.0	12574.5	16799.5		22366.5	25207.5
31			8411.5	12575.0	16800.0		22367.0	25208.0
32			8412.0	12575.5	16800.5		22367.5	
33			8412.5	12576.0	16801.0		22368.0	
34			8413.0	12576.5	16801.5		22368.5	
35			8413.5		16802.0		22369.0	
36			8414.0		16802.5		22369.5	
37					16803.0		22370.0	
38					16803.5		22370.5	
39					16804.0		22371.0	
40							22371.5	
41							22372.0	
42							22372.5	
43							22373.0	
44							22373.5	
45							22374.0	

(c) Distress and calling. The frequencies 2174.5 kHz, 4177.5 kHz, 6268.0 kHz, 8376.5 kHz, 12520.0 kHz, and 16695.0 kHz may be used for NBDP and data transmissions by coast and ship stations on a simplex basis for distress and safety purposes.

8. In Section 80.363, paragraphs (a) and (b) would be revised in their entirety to read as follows:

§ 80.363 Frequencies for facsimile.

* * * * *

(a) Ship station frequencies. The following frequencies are available for use by authorized ship stations for facsimile.

Assignable ship frequencies for facsimile (kHz)								
2070.5	4154.5	6235.5	8302.5	12370.5	16551.5	18847.5	22181.5	25123.5
2072.5	4169.5	6259.5	8338.5	12418.5	16614.5	18868.5	22238.5	25159.5
2074.5								
2076.5								

(b) Coast station frequencies.

The following table describes the exclusive maritime mobile HF frequency bands that are available for assignment to coast stations using 3 kHz channels for facsimile. However, any frequency in the 2000-27500 kHz bands, listed in Part 2 of the Commission's Rules as available for shared use by the maritime mobile service and other radio services, is available for assignment to coast stations for facsimile.

Frequency bands for Coast facsimile (kHz)	
4221.0 - 4351.0	16904.5 - 17242.0
6332.5 - 6501.0	19705.0 - 19755.0
8438.0 - 8707.0	22445.5 - 22696.0
12658.5 - 13077.0	26122.5 - 26145.0

* * * * *

9. In Section 80.369, paragraphs (b) and (d) would be revised to read as follows:

§ 80.369 Distress, urgency, safety, call and reply frequencies.

* * * * *

(b) The frequencies 4125.0 kHz, 6215 kHz, 8291 kHz, 12290 kHz, and 16420 kHz may be used by coast and ship stations on a simplex basis for distress and safety communications. The frequency 4125.0 kHz may also be used for distress and safety communications between aircraft and maritime mobile stations.

* * * * *

(d) In the 4000-27500 kHz band, the following coast frequencies are available for assignment to public coast stations for call and reply communications. The paired ship frequencies are available for use by authorized ship stations.

Call and reply frequency pairs in the 4000-27500 kHz Carrier Frequencies (kHz)		
Channel No.	Ship transmit	Coast transmit
421	4125 [1,2,3]	4417 [1]
606	6215 [2,3]	6516 [1]
821	8255	8779
1221	12290 [3]	13137
1621	16420 [3]	17302
1806	18795	19770
2221	22060	22756
2510	25097	26172

1 The frequencies 4125 kHz, 4417 kHz, and 6516 kHz are also available on a simplex basis for private communications, see § 80.373(c) of this part.

2 The frequencies 4125 kHz and 6215 kHz are also available on a simplex basis to ship and coast stations for call and reply, provided that the peak envelope power does not exceed 1 kW.

3 The frequencies 4125 kHz, 6215 kHz, 8291 kHz, 12290 kHz, and 16420 kHz are also available on a simplex basis for distress and safety traffic, see paragraph (b) of this section.

* * * * *

10. In Section 80.371, paragraphs (b) and (d) would be revised in their entirety to read as follows:

§ 80.371 Public correspondence frequencies.

* * * * *

(b) Working frequencies in the 4000-25700 kHz band. This paragraph describes the working carrier frequencies in the 4000-27500 kHz band.

(1) The following table specifies the carrier frequencies available for assignment to public coast stations. The paired ship frequencies are available for use by authorized ship stations.

TABLE A

Working carrier frequency pairs in the 4000-27500 kHz band

Region	Carrier frequencies (kHz) Channel No.	Ship transmit	Coast transmit
East Coast.....	403	4071.0	4363.0
	410	4092.0	4384.0
	411	4095.0	4387.0
	412	4098.0	4390.0
	416	4110.0	4402.0
	417	4113.0	4405.0
	422	4128.0	4420.0
	423	4131.0	4423.0
	802	8198.0	8722.0
	805	8207.0	8731.0
	808	8216.0	8740.0
	810	8222.0	8746.0
	811	8225.0	8749.0
	814	8234.0	8758.0
	815	8237.0	8761.0
	825	8267.0	8791.0
	826	8270.0	8794.0
	831	8285.0	8809.0
	1203	12236.0	13083.0
	1206	12245.0	13092.0
	1208	12251.0	13098.0
	1209	12254.0	13101.0
	1210	12257.0	13104.0
	1211	12260.0	13107.0
	1215	12272.0	13119.0
	1222	12293.0	13140.0
	1223	12296.0	13143.0
	1228	12311.0	13158.0
	1230	12317.0	13164.0
	1601	16360.0	17242.0

	1605	16372.0	17254.0
	1609	16384.0	17266.0
	1610	16387.0	17269.0
	1611	16390.0	17272.0
	1616	16405.0	17287.0
	1620	16417.0	17299.0
	1626	16435.0	17317.0
	1631	16450.0	17332.0
	2201	22000.0	22696.0
	2205	22012.0	22708.0
	2210	22027.0	22723.0
	2215	22042.0	22738.0
	2216	22045.0	22741.0
	2222	22063.0	22759.0
	2236	22105.0	22801.0
West Coast.....	401	4065.0	4357.0
	416	4110.0	4402.0
	417	4113.0	4405.0
	804	8204.0	8728.0
	809	8219.0	8743.0
	814	8234.0	8758.0
	1201	12230.0	13077.0
	1202	12233.0	13080.0
	1203	12236.0	13083.0
	1229	12314.0	13161.0
	1230	12317.0	13164.0
	1602	16363.0	17245.0
	1603	16366.0	17248.0
	1624	16429.0	17311.0
	2214	22039.0	22735.0
	2223	22066.0	22762.0
	2228	22081.0	22777.0
	2236	22105.0	22801.0
Gulf Coast.....	404	4074.0	4366.0
	405	4077.0	4369.0
	414	4104.0	4396.0
	419	4119.0	4411.0
	824	8264.0	8788.0
	829	8279.0	8803.0
	830	8282.0	8806.0
	1212	12263.0	13110.0
	1225	12302.0	13149.0
	1226	12305.0	13152.0
	1607	16378.0	17260.0
	1632	16453.0	17335.0
	1641	16480.0	17362.0
	2227	22078.0	22774.0
	2231	22090.0	22786.0
	2237	22108.0	22804.0

Great Lakes.....	405	4077.0	4369.0
	409	4089.0	4381.0
	418	4116.0	4408.0
	826	8270.0	8794.0
Hawaii.....	418	4116.0	4408.0
	808	8216.0	8740.0
	1222	12293.0	13140.0
	1601	16360.0	17242.0
Caribbean.....	604	6209.0	6510.0
	605	6212.0	6513.0
	1602	16363.0	17245.0
	1603	16366.0	17248.0
	2223	22066.0	22762.0

(2) The following table specifies the additional frequency pairs for ship and public coast stations for public correspondence that will become available upon issuance of an Order in the Federal Register. The exact allotment of the additional frequencies in Table B is dependent upon the international allotment plan expected to be published by the International Frequency Registration Board (IFRB). The initial IFRB allotment plan is expected to be published in October 1990, and the final IFRB allotment plan will be published effective July 1, 1991.

TABLE B - ADDITIONAL FREQUENCIES

Working carrier frequency pairs in the 4000-27500 kHz band

Region	Channel No.	Carrier frequencies (kHz) Ship transmit	Coast transmit
East Coast.....	frequencies are dependent upon the IFRB allotment plan		
West Coast.....			
Gulf Coast.....			
Great Lakes.....			
Hawaii.....			
Caribbean.....			

(3) The following table specifies the simplex (non-paired) carrier frequencies available for assignment to public coast stations in accordance with the provisions of paragraph (b)(4) of this section. These frequencies are available for use by authorized ship stations for public correspondence.

Simplex radiotelephony frequencies in the 4000-27500 kHz Band Carrier Frequencies (kHz)[1]				
12362	16537	18825	22174	25100
12365	16540	18828	22177	25103
	16543	18831		25106
	16546	18834		25109
		18837		25112
		18840		25115
		18843		25118

[1] Coast stations limited to a maximum transmitter power of 1 kW (PEP).

(4) Applicants for these public coast frequencies specified in this section must submit a substantial showing of need based on the following factors:

(i) a schedule of each currently licensed working frequency in the 4000-27500 kHz band and the expected use of the proposed frequencies;

(ii) for additional frequencies within the same MHz band, a factual showing of the 3 busiest hours of any 4 days within a consecutive 10 day period for each of the 2 months immediately preceding the filing of the application indicating that the applicant has used its currently assigned frequencies within the same MHz band an aggregate average of at least 40% of the 3 busiest hours of each day for exchanging communications;

(iii) any other facts that support the need for the proposed assignment, e.g., evidence of radio interference by another station located near enough to render a currently licensed frequency substantially unusable; and

(iv) for simplex frequencies listed in paragraph (b)(3) of this section, an additional showing supporting the use of simplex rather than duplex frequencies for the proposed situation.

* * * * *

(d) Working frequencies in the Mississippi River System. The Mississippi River System includes the Mississippi River and connecting navigable waters other than the Great Lakes. The following simplex frequencies are available for assignment to public coast stations serving the Mississippi River System for radiotelephony communications. These simplex frequencies also are available for use by authorized ship stations within communication service range, whether or not the ship is operating within the confines of the Mississippi River System.

Mississippi River System Working Frequencies Carrier Frequencies (kHz)					
2086[1]	4065	6209	8201	12233	16417
2782	4089	6212	8213	13080	17299
	4116	6510	8725		
	4408	6513	8737		

1 Limited to a maximum transmitter output of 150 watts (PEP).

* * * * *

11. In Section 80.373, paragraphs (c) and (i) would be revised in their entirety to read as follows:

§ 80.373 Private communications frequencies.

* * * * *

(c) Frequencies in the 2000-27500 kHz bands for business and operational communications.

(1) The following simplex frequencies in the 2000-27500 kHz band are available for assignment to private coast stations for business and operational radiotelephone communications. These simplex frequencies also are available for use by authorized ship stations for business and operational radiotelephone communications.

Business and Operational Frequencies in the 2000-27500 kHz Band Carrier Frequencies (kHz)						
2065.0[1,3]	4146	6224	8294	12353	16528	22159
2079.0[1,3]	4149	6227	8297	12356	16531	22162
2096.5[1]	4125[2]	6230		12359	16534	22165
3023.0[4]	4417[5]	6516[5]				22168
	5680[4]					22171

1 Limited to peak envelope power of 150 watts.
2 The frequency 4125 kHz is also available for distress and safety, and calling and reply, see § 80.369(b) and (d) of this part.
3 The frequencies 2065.0 kHz and 2079.0 kHz must be coordinated with Canada.
4 The frequencies 3023.0 kHz and 5680.0 kHz are available to private coast stations licensed to state and local governments and any scene-of-action ships for the purpose of search and rescue scene-of-action coordination including communications with any scene-of-action aircraft.
5 The frequency 6516 kHz is limited to daytime operations. The frequencies 4417 kHz and 6516 kHz are also available for calling and reply, see § 80.369(d) of this part.

* * * * *

(i) Frequencies in the 1600-5450 kHz band for private communications in Alaska. The following simplex frequencies are available for assignment to private fixed stations located in the State of Alaska for radiotelephony communications with ship stations. These simplex frequencies are available for use by authorized ship stations for radiotelephony communications with private fixed stations located in the State of Alaska.

Private communications in Alaska Carrier frequencies (kHz)		
1619.0	2382.0	2563.0
1622.0	2419.0	2566.0
1643.0	2422.0	2590.0
1646.0	2427.0	2616.0
1649.0	2430.0	3258.0
1652.0	2447.0	3261.0[1]
1705.0	2450.0	4366.0
1709.0	2479.0	4369.0
1712.0	2482.0	4396.0
2003.0	2506.0	4402.0
2006.0	2509.0	4420.0
2115.0	2512.0	4423.0
2118.0	2535.0	5167.5
2379.0	2538.0	

1 Ship stations must limit use of 3261.0 kHz to communications over distances which cannot be reached by the use of a frequency below 2700 kHz or above 156.000 MHz.

* * * * *

12. A new Section 80.374 and headnote would be added to read as follows:

§ 80.374 Special provisions for frequencies in the 4000-4063 kHz and the 8100-8195 kHz bands shared with the fixed service.

Until implementation procedures and schedules are determined by a conference of the International Telecommunications Union (ITU), the bands 4000-4063 kHz and 8100-8195 kHz are allocated on a shared primary basis between the fixed service and the maritime mobile service; see § 2.106, note US236, of the Commission's Rules.

(a) Application requirements. Applicants for public coast station frequencies described in this section must submit a substantial showing of need based on the following factors:

(i) a schedule of each currently licensed 4, 6, and 8 MHz frequency and the expected use of the proposed frequencies;

(ii) for additional frequencies within the same MHz band, a factual showing of the 3 busiest hours of any 4 days within a consecutive 10 day period for each of the 2 months immediately preceding the filing of the application indicating that the applicant has used its currently assigned frequencies within the same MHz band an aggregate average of at least 40% of the 3 busiest hours of each day for exchanging communications; and

(iii) any other facts that support the need for the proposed assignment, e.g., evidence of radio interference by another station located near enough to render a currently licensed frequency substantially unusable.

(b) Frequencies in the 4000-4063 kHz band.

(1) The frequencies in the 4000-4063 kHz bands are available to ship and public coast stations for:

(i) supplementary ship-to-shore duplex operations with coast stations assigned the frequencies described in § 80.371(b) of this part;

(ii) intership simplex operations and cross-band operations; or

(iii) duplex operations with coast stations assigned in the band 4438-4650 kHz, as described in § 80.373(d) of this part.

(2) The following table describes the channelization of carrier frequencies in the 4000-4063 kHz band.

Carrier Frequencies (kHz)			
4000	4015	4030	4045
4003	4018	4033	4048
4006	4021	4036	4051
4009	4024	4039	4054
4012	4027	4042	4057

(c) Frequencies in the 8100-8195 kHz band.

(1) The frequencies in the 8100-8195 kHz bands are available to ship and public coast stations for:

(i) supplementary ship-to-shore duplex operations with coast stations assigned the frequencies described in § 80.371(b) of this part;

(ii) intership simplex operations and cross-band operations; or

(iii) ship-to-shore or shore-to-ship simplex operations.

(2) The following table describes the channelization of carrier frequencies in the 8100-8195 kHz band.

Carrier frequencies (kHz)		
8101	8137	8167
8104	8140	8170
8107	8143	8173
8110	8146	8176
8116	8149	8179
8119	8152	8182
8122	8155	8185
8125	8158	8188
8131	8161	8191
8134	8164	

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